SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 742

STATE OF MARYLAND, ET AL.,
Appellants,

v.

W. WILLARD WIRTZ,
SECRETARY OF LABOR, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

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INDEX

Table of Contents

	PAGE
Reference to Opinions Below	1
Grounds of Jurisdiction	2
Questions Presented	3
Statement of the Case	4
Substantiality of Questions Presented	5
Appendix A—Opinions of Court	1a
Judgment of Court	51a
Appendix B—Fair Labor Standards Act as amended in 1966	52a

Table of Citations

Cases

Ashton v. Cameron County, 298 U.S. 513	7
Hopkins Fed. S. & L. Asso. v. Cleary, 296 U.S. 315	7
Maryland v. Wirtz, 269 F. Supp. 826	1
McCulloch v. Maryland, 4 Wheat. 316	7
New York v. United States, 326 U.S. 572	6
Polish Nat. Alliance v. National Labor Rel. Bd., 322 U.S. 643	7
Radio Corp. of America v. United States, 95 F. Supp. 660, 341 U.S. 412, 71 S. Ct. 806, 95 L. Ed. 1062	2
Stafford v. Wallace, 258 U.S. 495, 42 S. Ct. 397, 66 L. Ed. 735	2
Texas v. White, 7 Wall. 700	6

Statutes

	PAGE
United States Code:	
Title 28—	
Section 1253	2
Section 1337	2
Section 2201	2
Section 2202	2
Section 2282	2, 4
Section 2284	2, 4
Title 29—	
Sections 201, et seq.	2, 3, 4
United States Constitution:	
Article I, Section 8	3, 4
Amendment X	3
Amendment XI	3

Miscellaneous

Rules of the Supreme Court, Rule 15	1

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JURISDICTIONAL STATEMENT

Appellants, twenty-eight states of the United States, appeal from the judgment of the United States District Court for the District of Maryland denying their motion for summary judgment and prayers for interlocutory and permanent injunctive relief and dismissing their Complaint. This Statement is submitted pursuant to Rule 15 of the Rules of the Supreme Court to demonstrate that this Court has jurisdiction to consider the appeal, and that substantial federal questions are involved therein.

REFERENCE TO OPINIONS BELOW

The District Court rendered three separate Opinions in the case below, which are reported in 269 F. Supp. 826

(1967). A copy of said Opinions and a copy of the subsequent Order thereon are set forth in Appendix A, *infra*, pp. 1a-51a.

GROUNDS OF JURISDICTION

This action was originally instituted by the State of Maryland in the District Court for the District of Maryland pursuant to Title 28, U. S. Code, Sections 1337, 2201, 2202, 2282 and 2284 to declare the application of the Fair Labor Standards Act (Title 29, U. S. Code, Sections 201, *et seq.*) to employees of the State and its political subdivisions, as provided by Public Law 89-601, to be in violation of the United States Constitution and to enjoin the various defendants from so enforcing the Act. Twenty-seven other states and one school district subsequently joined Maryland as parties plaintiff. A three-judge court, convened pursuant to Title 28, U. S. Code, Sections 2282 and 2284, rendered three Opinions on June 13, 1967, two of which expressed a decision to deny the declaratory and injunctive relief requested by Appellants. On June 26, 1967, a final judgment was entered by the court in accordance with the said two Opinions, which denied the relief and dismissed the Complaint. A Notice of Appeal to this Court was filed in the United States District Court for the District of Maryland on August 24, 1967.

This is a direct appeal from the judgment of a three-judge District Court denying, after notice and hearing, a permanent injunction in a civil action required by Title 28, U. S. Code, Section 2282 to be heard by a three-judge court. This Court has jurisdiction to consider this appeal under Title 28, U. S. Code, Section 1253. *Radio Corp. of America v. United States* (D.C. Ill., 1950), 95 F. Supp. 660, *aff'd* 341 U.S. 412, 71 S. Ct. 806, 95 L. Ed. 1062; *Stafford v. Wallace* (1922), 258 U.S. 495, 42 S. Ct. 397, 66 L. Ed. 735.

The text of the Fair Labor Standards Act (Title 29, U. S. Code, Sections 201, *et seq.*), as amended by Public Law 89-601, is set forth in Appendix B, *infra*, pp. 52a-137a.

QUESTIONS PRESENTED

1. Did the Congress of the United States, in enacting Public Law 89-601, exceed its power to regulate interstate commerce granted under Article I, Section 8 of the United States Constitution, insofar as said Public Law 89-601 purports to extend the provisions of the Fair Labor Standards Act to the school systems and hospitals of the States and their political subdivisions?

2. Did the Congress of the United States, in enacting Public Law 89-601, infringe upon powers reserved to the States under Article X of the Amendments to the United States Constitution, insofar as Public Law 89-601 purports to extend the provisions of the Fair Labor Standards Act to the school systems and hospitals of the States and their political subdivisions?

3. Did the Congress of the United States, in enacting Public Law 89-601, authorize the violation of Article XI of the Amendments to the United States Constitution, insofar as said Public Law 89-601 purports to authorize actions by or on behalf of private citizens against the States in United States District Courts?

4. Under our dual system of government, does the Congress of the United States have the constitutional authority to regulate a State in the performance of its *necessary* governmental functions?

5. Does the Congress of the United States have the authority to require a State Legislature or the governing body of any political subdivision thereof to either levy and collect taxes for a particular purpose or curtail or discontinue necessary governmental services?

6. Does a State, in the performance of its necessary governmental functions, engage in commerce within the meaning of Article I, Section 8 of the Constitution of the United States?

7. Are state and local school systems and hospitals ultimate consumers within the meaning of Section 3(i) of Public Law 89-601 and, therefore, not subject to the provisions of said law?

STATEMENT OF THE CASE

Public Law 89-601, which became effective February 1, 1967, purports to extend the minimum wage and maximum hour provisions of the Fair Labor Standards Act (Title 29, U. S. Code, Sections 201, *et seq.*) to public elementary and secondary schools, institutions of higher education, and hospitals owned and operated by the States and/or their political subdivisions. The funds necessary to operate such schools, institutions and hospitals, and therefore to pay any increased wages occasioned by application of the Act, are required by the Constitutions of all of the Appellant States to be appropriated by their respective legislatures and funded by taxes levied by the same bodies. The direct effect of the Act, therefore, is to direct State Legislatures as to how much money to appropriate for the operation of agencies of the State government and, concomitantly, how much taxes to levy for the support of such agencies.

Appellants and Appellees filed motions for summary judgment (Appellees' motion being, in the alternative, a motion to dismiss) before a three-judge court convened under Title 28, U. S. Code, Sections 2282 and 2284. On June 13, 1967, the court rendered three Opinions as follows: (i) Judge Winter held the entire Act, as applied to the States and their subdivisions, to be constitutional; (ii) Judge Northrop held the entire Act, as so applied, to be

unconstitutional; and (iii) Judge Thomsen held the minimum wage provisions of the Act, as so applied, to be constitutional, but expressed doubt as to the constitutionality of the maximum hour provisions of the Act.

SUBSTANTIALITY OF QUESTIONS PRESENTED

The questions presented in this appeal relate directly to and will require a definition of one of the most important constitutional questions that this country has faced since 1787; that is, the nature of our federal system of government. What is the true constitutional relationship, in terms of political sovereignty, between the States and the Federal Government?

The questions presented to this Court involve essentially two issues: (1) are necessary State governmental functions, such as public education and public health services by the States subject to direct control by Congress merely because such activities may have in some way an effect on interstate commerce; and (2) if so, may Congress, under the guise of regulating interstate commerce, control these activities in such a way as to direct State Legislatures as to how much to tax, how much to appropriate, where to appropriate, or to direct State Executives as to what services will be performed by the State by controlling the wages and hours of its employees?

These questions ask whether the power to regulate commerce, plenary and broad though it is, is not constitutionally restricted to the extent that it cannot be exercised in a way which would materially infringe upon the political integrity of the States in areas of essentially local concern. The idea that the maintenance of effective State government imposes such a limitation has been expressed several times by this Court and was the basis upon which the Constitution was originally ratified.

In *Texas v. White* (1868), 7 Wall. 700, the Court noted:

> "The preservation of the states and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible union, composed of indestructible states."

With more particular reference to the type of situation involved here, Justices Douglas and Black stated in dissent in *New York v. United States* (1946), 326 U.S. 572, at page 574:

> "The notion that the sovereign position of the states must find its protection in the will of the transient majority of Congress is foreign to and in negation of our Constitutional System. There will often be vital regional interests represented by no majority in Congress. The Constitution was designed to keep the balance between the states and the nation outside the field of legislative controversy."

Later, the same Justices stated, in broader fashion:

> "The right of the states to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted."

There can be no doubt that a federal tax on state-operated public schools and hospitals could never be sustained. *New York v. United States, supra,* 326 U.S. 572, at pages 583, 587. This is because, in the words of John Marshall, the power

to tax involves the power to destroy. *McCulloch v. Maryland* (1819), 4 Wheat. 316. But the taxing power is not the exclusive weapon of destruction. The power to regulate commerce may also involve the power to destroy, and it, like other granted powers, may not be misapplied to destroy the political integrity of the states. See *Ashton v. Cameron County* (1936), 298 U.S. 513; *Hopkins Fed. S. & L. Asso. v. Cleary* (1935), 296 U.S. 315; and *Polish Nat. Alliance v. National Labor Rel. Bd.* (1944), 322 U.S. 643.

The question of specific Congressional regulation of State activities has been considered by this Court only in a limited and unrelated context. The cases have dealt with railroads, dock facilities, fish hatcheries, mineral waters, wheat and timber lands. It has never before been presented with such an assertion of direct and substantial federal control over traditional and indispensable activities of State government. Should this Court affirm the decision of the District Court, it would appear that whatever political power, sovereignty or integrity is possessed by the States exists only at the sufferance of Congress and may be withdrawn at its will. It is essential that the Supreme Court of the United States speak on such a monumental question, and of the greatest urgency that the States have a full opportunity to brief and argue this cause which is so basic to the structure of our Federal system of government.

Respectfully submitted,

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APPENDIX A

OPINION OF COURT

(Filed June 13, 1967)

In The United States District Court for the District of Maryland

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Civil Action No. 18005

State of Maryland, et al.,

Plaintiffs,

v.

W. Willard Wirtz, Secretary of Labor United States Department of Labor, et al.,

Defendants.

Before: Winter, Circuit Judge, Thomsen, Chief Judge, and Northrop, District Judge.

WINTER, Circuit Judge:

This is an action brought by the State of Maryland, in which twenty-five other States have intervened as parties plaintiff, asking the Court to declare unconstitutional the 1966 Amendments to the Fair Labor Standards Act[1] (the "1966 Amendments") insofar as they apply to employees of the plaintiff States, and to enjoin enforcement of the Act, as amended, against the States. Although the 1966 Amendments extend the Act's coverage to employees of enterprises, whether public or private, engaged in the operation of schools, hospitals and related institutions, street, suburban or interurban electric railways, and local trolley and motorbus carriers, the States, in briefs and

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[1] Public Law, 89-601, 80 Stat. 830, amending the Fair Labor Standards Act of 1938, 29 U.S.C.A. §§201, *et seq.*

oral argument, challenge application of the Act only to public schools, hospitals and related institutions; and this Court will limit its consideration accordingly.

Defendants have filed a motion to dismiss or, in the alternative, a motion for summary judgment. Plaintiffs have filed cross-motions for summary judgment. The parties have entered into extensive stipulations of fact with regard to Maryland, Texas and Ohio. It is agreed that these data may be taken as representative of the situation in the other plaintiff States. Some objections to relevancy and materiality have been raised, but the Court is satisfied that the conclusions reached herein would not be affected by the exclusion of any of the stipulation evidence.

Introduction

The Fair Labor Standards Act, 29 U.S.C.A. §§ 201, *et seq.*, was first enacted in 1938 as a result of Congressional findings, recited in § 2(a) of the Act, 29 U.S.C.A. § 202, that:

> "the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

It was therefore declared to be the policy of Congress, through the exercise of its power to regulate commerce among the several states "to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employments or earning power." 29 U.S.C.A. § 202(b). Congress

accordingly provided that employers must pay those employees who were "engaged in commerce or in the production of goods for commerce" a minimum hourly wage, 29 U.S.C.A. § 206(a), and one and one-half times their regular hourly rate for weekly hours over a specified maximum, 29 U.S.C.A. § 207(a)(1). States and their political subdivisions were excluded from the Act's definition of "Employer." 29 U.S.C.A. § 203(d).

The constitutionality of the original Act was sustained in *United States v. Darby*, 312 U.S. 100 (1941). The Court stated, *inter alia*, that the power of Congress over commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Id.*, at p. 118.[2]

The Act has been amended several times,[3] but until the 1966 Amendments state employees were not brought within its coverage.

In 1961 the "enterprise" concept was introduced. 29 U.S.C.A. § 203(r), 75 Stat. 65. In addition to employees previously covered — those personally engaged in interstate commerce or in the production of goods for commerce — the Act was extended to cover "the related activities performed (either through unified operation or common

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[2] Subsequent decisions have pointed out that "Congress did not exercise in this Act the full scope of the commerce power," but rather chose "to regulate only part of what it constitutionally can regulate." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570-571 (1943); *Kirschbaum Co. v. Walling*, 316 U.S. 517, 521-522 (1942). See also *Overstreet v. North Shore Corp.*, 318 U.S. 125, 128 (1943); *Higgins v. Carr Bros. Co.*, 317 U.S. 572, 574 (1943); *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, 313 (1960).

[3] The principal amendatory enactments have been the Portal-to-Portal Act of 1947 (61 Stat. 84), the Fair Labor Standards Amendments of 1949 (63 Stat. 910), the Fair Labor Standards Amendments of 1955 (69 Stat. 711), the Fair Labor Standards Amendments of 1961 (75 Stat. 65), the Equal Pay Act of 1963 (77 Stat. 56), and the Fair Labor Standards Amendments of 1966 (80 Stat. 830).

control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor." An "enterprise engaged in commerce or in the production of goods for commerce," and therefore covered by the Act, was defined in terms of a minimum annual dollar volume of gross sales and, in some instances, the particular type of business involved. See 29 U.S.C.A. § 203(r) and (s). The validity and scope of the enterprise concept has not yet been decided by the Supreme Court.

The 1966 Amendments extended the enterprise basis of coverage and brought within the Act public as well as private enterprises engaged in operating schools, hospitals and related institutions, street, suburban or interurban electric railways, and local trolley or motorbus carriers.[4] The definition of "employer" in 29 U.S.C.A. § 203(d) was amended to eliminate the existing exclusion of States and their political subdivisions insofar as they engaged in those activities. In fitting employees first covered by the 1966 Amendments into the minimum wage and maximum hour scale of employees theretofore covered, the 1966 Amend-

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[4] In addition to amending the Act's definition of "employer" (see text, *infra*), other pertinent changes effected by the 1966 Amendments were: an existing exemption for hospitals and certain related institutions and schools for handicapped or gifted children, formerly contained in §13(a)(2)(iii), was eliminated, and such institutions and schools, as well as elementary and secondary schools and institutions of higher learning, were designated in §3(s)(4) as types of enterprises whose coverage would not depend on an annual gross volume test; the existing annual gross volume test for local transit enterprises (in former §3(s)(2)) was lowered from $1 million to $500,000 until Feb. 1, 1969 and to $250,000 thereafter (§3(s)(1)); and the definition of "enterprise" in §3(r) was amended to provide that local transit operations, the above described schools and hospitals and related institutions, whether public or private or for profit or not for profit, would be regarded as operated for a "business" purpose.

ments provide for an escalation of the minimum wage and of maximum hours over a period of five years.[5]

The 1966 Amendments, which thus had the effect of extending the minimum wage and overtime provisions of the Fair Labor Standards Act to a *portion* of the labor market not theretofore covered,[6] are attacked insofar as they extend coverage to certain employees of public schools, hospitals and related institutions. Despite the impression sought to be created by several of the plaintiff States, extension of the Act to certain groups of state employees was not a concept first advanced in the Second Session of the 89th Congress under circumstances which would have prevented the States from presenting their views in opposition to the proposal, had they sought to keep abreast of matters under consideration by Congress.

The first legislative effort to extend coverage to some state employees occurred in the First Session of the 89th Congress.[7] During the Second Session of the 89th Congress,

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[5] Thus, while the minimum wage for employees theretofore covered by the Act is $1.40 per hour, for the first year after February 1, 1967, and $1.60 per hour thereafter, minimum wages for employees newly covered are $1.00 per hour, for the first year and increase 15¢ per year for each year thereafter until the level of $1.60 is reached. Similarly, overtime must be paid to employees theretofore covered who work in excess of 40 hours per week, while overtime must be paid to newly covered employees who work more than 44 hours, the first year, 42 hours, the second year, and 40 hours each year thereafter, respectively, after February 1, 1967.

[6] While the 1966 Amendments to the Fair Labor Standards Act, *inter alia*, extend the Act's coverage to employees of schools, hospitals and related institutions, electric railways, trolley and motorbus systems, *whether public or private*, not every employee of such enterprise is made subject to the Act. Section 13 of the Act, 29 U.S.C.A. §213, as it existed prior to the effective date of the 1966 Amendments, and as amended by the 1966 Amendments, exempts certain classes of employees. For our purposes, the significant exemption is that of a person "employed in a bona fide executive, administrative or professional capacity (including any employee employed in the capacity of academic, administrative personnel or teacher in elementary or secondary school * * *)."

[7] During the 89th Congress, 1st Session, H. R. 8259, was introduced in response to a special message of President Johnson urging,

when H. R. 13712, which, as amended, was enacted as the 1966 Amendments, was introduced into the House of Representatives, it contained language which would have extended coverage (subject to the exemptions in § 13)[8] to any person "in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally handicapped or gifted children, or an institution of higher education (*regardless of whether or not such hospital, institution or school is public or private or operated for profit or not for profit*) * * *."[9] (Emphasis supplied.) During legislative consideration of the bill, the only variation as to the extent of coverage, pertinent to this law suit, was whether public or private school employees covered should be limited to those employed by "an institution of higher education" or whether they should include persons employed by "an elementary or secondary school."[10] The

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inter alia, extension of the Fair Labor Standards Act to an additional 4½ million workers. H. R. 8260, introduced by Mr. Roosevelt, also would have extended coverage of the Act. Neither bill purported to be applicable to state employees. While hearings on both bills were being conducted by the House Committee on Education and Labor, to which they had been referred, Mr. Roosevelt introduced another bill, H. R. 10518. This new bill extended coverage to certain employees of public and private hospitals and institutions of higher education regardless of whether public or private, profit or non-profit.

H. R. 10518 was referred to the Committee on Education and Labor which, on August 25, 1965, reported the bill favorably, without amendment, and recommended that it be passed. House Rpt. No. 871, 89th Cong., 1st Sess. H. R. 10518 was then committed to the Committee of the Whole House on the State of the Union and no further action was taken thereon. Cong. Quart. Almanac, 1965, Vol. 21, p. 861.

[8] See, n. 6, *supra*.

[9] The bill as originally introduced would have also extended coverage to employees of a "street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (*regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit*) * * *." (Emphasis supplied.)

[10] As introduced, the bill did not apply to employees of elementary and secondary schools, although it did apply to employees of insti-

question was resolved by extending coverage to employees of elementary and secondary schools, as well as institutions of higher learning, subject, again, to the exemptions contained in § 13 of the Act, as also amended by the 1966 Amendments.

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tutions of higher learning, whether public or private. After the House Education and Labor Committee reported the bill favorably, with amendments, the House resolved itself into the Committee of the Whole House on the State of the Union. At this point in the legislative process, Mr. Collier, of Illinois, offered an amendment to extend coverage to employees of elementary and secondary schools. The amendment was adopted and the bill passed the House as so amended. He made the following statement about the rationale of his amendment, viz.,

"(Mr. Collier) Mr. Chairman, these amendments are simple and sound and essential amendments. I do not believe that any member of this body who believes in the principle and purpose of the bill before us today can oppose them.

"What we have done here, if Members will review with me the language of the definition of 'enterprise,' is to say that in sum and substance the employee who works as a dishwasher in a home for the sick or the aged or mentally ill, or one who works as a dishwasher in a college or university cafeteria, or one who works as a dishwasher, for example, in a mental institution, is covered under this bill. Yet, the same employee working as a dishwasher in an elementary or high school cafeteria is not covered.

"*All I want to do is to establish equity in application of the bill.* Let me tell why. I believe I can best explain it by giving an example. This is an actual case.

"In a suburban area of one of our southern States, school officials were recently notified that poverty funds were available to hire students who qualified under the poverty family income level at $1.25 per hour. What happened was this: The same school had working in the cafeteria women who had been employed for years — in fact, one was a widow — drawing 85 cents an hour for working in the school cafeteria. Yet, children were handpicked and given $1.25 an hour to wash blackboards in the same school.

"I do not believe there is anyone sitting in this House today who can justify this type of situation realizing, as we all must, that there will be under the poverty program a $1.25 hourly wage level. If not, then I would have grave reservation as to the depth of the sincerity such a Member would have in the principle of minimum wage.

"(Mr. Pucinski) Mr. Chairman, will the gentleman yield?

"(Mr. Collier) I yield to the gentleman from Illinois.

"(Mr. Pucinski) Mr. Chairman, if I understand this amendment correctly, it will establish a different fair labor standard provision

The plaintiff States attack the constitutionality of the 1966 Amendments on the ground that the activities of the States and various school districts in the operation of schools, hospitals and related institutions are not commerce,[11] that the "enterprise" concept embodied in the Act by amendments adopted in 1961 is unconstitutional, and that the 1966 Amendments unconstitutionally impugn state sovereignty.[12]

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for people presently employed in elementary and secondary schools and universities.

"(Mr. Collier) That is exactly correct. *I do not want any inequities such as we have been talking about today. We are moving to achieve equity which means treating everyone alike.*" (Emphasis supplied.) 112 Congressional Record (May 25, 1966), pp. 10820-10821.

The Senate Committee on Labor and Public Welfare reported the bill favorably, with an amendment to *exclude* employees of elementary and secondary schools, and this amendment was adopted. Senate Report No. 1487, August 23, 1966, 2 U.S.C. Congressional and Administrative News (89th Congress — Second Session, 1966), p. 3002. The Senate Committee, however, did not undertake to exclude any other public employees from coverage under the Act. The excluded coverage was subsequently restored by the Conference Committee appointed to iron out differences between the House and Senate versions of the legislation. Conference Report No. 2004, September 6, 1966, 2 U.S.C. Congressional and Administrative News, *supra*, p. 3047. It was with an extension of coverage to employees of elementary and secondary schools that H. R. 13712 was finally enacted and signed into law.

[11] Texas words this point as follows: "A state in the performance of the functions of its sovereignty is not engaged in commerce within the meaning of the commerce clause of the constitution of the United States."

[12] Maryland also advances an argument based upon the Eleventh Amendment and its asserted conflict with the provision of the Fair Labor Standards Act which permits an employee not paid in accordance with the minimum wage or overtime provisions of the Act to bring suit if such suit is not brought by the Secretary. 29 U.S.C.A. §216. This argument is beyond the scope of this consolidated proceeding and will not be further considered at this time. It may be made if and when the basic validity of the 1966 Amendments is established and some State employee attempts to sue his employer. Of course, when the argument is advanced and if it is found valid, due regard will be given to the other enforcement provisions con-

I conclude, for the reasons hereafter stated, that all three of these contentions should be resolved against the plaintiffs, that to the extent of the scope of this proceeding the 1966 Amendments should be declared valid and constitutional, and that injunctive relief should be denied.

Commerce Power

Maryland and Texas argue that the activities of a State do not constitute "commerce" which may be regulated under the exclusive power vested in Congress to regulate interstate and foreign commerce. Maryland argues more specifically that, with respect to the operation of public schools, the State's activity has three attributes which remove it from any legitimate definition of commerce, i. e., the activity is non-profit, it is purely governmental, and there is no non-governmental system to compete with or substitute for it.

At the outset, it is well to note that these arguments are based upon a more restrictive premise than the decided cases will support. *United States v. Darby, supra,* upholding the constitutionality of the Fair Labor Standards Act generally, is only one of many decisions which holds that the power of Congress over interstate commerce includes not only that which in itself is interstate commerce but also "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it, as to make the regulation of them appropriate

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tained in 29 U.S.C.A. §216 and the separability language in 29 U.S.C.A. §219.

Maryland and Texas also argue that their schools and hospitals are the "ultimate consumers" of commodities purchased from out-of-state, that such commodities are not "goods" as defined by 29 U.S.C.A. §203(i) and, as a consequence, the Fair Labor Standards Act is not applicable to them. This argument is one of statutory construction, not of constitutional significance, and is also one beyond the scope of this proceeding. It should be asserted in a suit in which the application of the Act to a particular school or hospital is brought into question, so that after full development of the facts, it may be determined if that particular enterprise meets the statutory tests for coverage.

means to the attainment of a legitimate end." *Id.*, at p. 118. See also, *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 300-301 (1964). Among the decided cases, the most extreme example of the reach of the commerce power of Congress to regulate local activity is *Wickard v. Filburn*, 317 U.S. 11 (1942), where a farmer's consumption of wheat raised on his own farm was held within the reach of Congress to regulate under the commerce clause because that consumption, and its counterpart on other farms, exerted a substantial economic effect on interstate commerce.

Thus, the proper inquiry is not limited to a consideration of whether the activities of the States in operating public schools, schools of higher education or hospitals, are "commerce" as such. The proper inquiry is much broader. It is whether such activities are commerce or affect commerce, even though local in nature, and hence within the power of Congress to regulate commerce.

Maryland's claims that public schools are non-profit, purely governmental and not in direct competition with non-governmental systems are not shibboleths to determine what is and what is not commerce. "Commerce" is not confined to "business" activity in a conventional sense; it includes non-business and non-profit activities, whether private or governmental in nature and irrespective of whether they compete with or may be substituted for by private enterprise. *Powell v. U. S. Cartridge Co.*, 339 U.S. 497 (1950); *Mitchell v. Lublin, McGaughy & Asso.*, 358 U.S. 207 (1959); *United States v. Ohio*, 385 U.S. 9 (1966); *Wirtz v. R. E. Lee Electric Company*, 339 F. 2d 686 (4 Cir. 1964); *Mitchell v. Owen*, 292 F. 2d 71 (6 Cir. 1961); *Goldberg v. Nolla, Galib & Cia.*, 291 F. 2d 371 (1 Cir. 1961), *cert. den.*, 368 U.S. 900 (1961); *N.L.R.B. v. Central Disp. & E. Hosp.*, 145 F. 2d 852 (D.C. Cir. 1945), *cert. den.*, 324 U.S. 847 (1945).[13] In *Public Building Authority of Birmingham v.*

[13] Pertinent also are the following authorities which have held to be "commerce," *non-commercial* interstate transportation of persons and chattels; *Edwards v. California*, 314 U.S. 160 (1941)

Goldberg, 298 F. 2d 367, 370 (5 Cir. 1962), the Court, in holding that federal employees engaged in processing claims for the payment of social security benefits and preparing government checks for beneficiaries were producing goods for commerce, summarized prior holdings by declaring that "there need be no private parties or profit motive present to constitute commerce." It will be noted that this was said in a case in which all of the factors urged by Maryland to render her activities not within the commerce power of Congress were present: the activity was governmental, non-profit, and could not be performed by private enterprise.

The fact is that under the stipulations before us there is abundant evidence that the States, in the performance of the functions where certain employees are covered by the Act, as amended by the 1966 Amendments, are not only engaging in commerce, or in the production of goods for commerce, but are engaging in activities, local in nature, which have a substantial effect on commerce. A brief recital of some of the stipulations between the parties is sufficient to demonstrate.

In the current fiscal year an estimated $38.3 billion will be spent by State and local public educational institutions in the United States. In the fiscal year 1965, these same authorities spent $3.9 billion operating public hospitals. Expenditures of this magnitude are bound to have an enormous impact on interstate commerce.

For Maryland, which was stipulated to be typical of the plaintiff States, 87% of the $8 million spent for supplies

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(movement of indigent persons across state lines); *Thornton v. United States*, 271 U.S. 414 (1926) (diseased cattle ranging across state lines); *Caminetti v. United States*, 242 U. S. 470 (1917) (transportation of women across state lines for non-commercial immoral purposes); *Brooks v. United States*, 267 U.S. 432 (1925) (transportation of stolen articles); *United States v. Hill*, 248 U.S. 420 (1919) (transportation of liquor for one's own consumption). As a latest expression of the state of the law, *Heart of Atlanta Motel, Inc. v. United States, supra*, at pp. 256-257, declares: "Nor does it make any difference whether the transportation is commercial in character."

and equipment by its public school system during the fiscal year 1965 represented direct interstate purchases. Over 55% of the $576,000 spent for drugs, x-ray supplies and equipment and hospital beds by the University of Maryland Hospital and seven other state hospitals were out-of-state purchases. With respect to seven other state hospitals which spent $875,000 on such items during the comparable period, the parties have stipulated that all or "the most part" of such items were manufactured outside of Maryland.

In Ohio, also stipulated to be typical of all of the plaintiff States, there are 708 school districts, 3 of which (stipulated to be typical of the other school districts) purchased a total of $323,000 in supplies in the fiscal year 1966. Approximately 50% of these purchases were directly from outside of the state. Ohio's six state universities spent $9 million on certain specified supplies in that year, over 42% of which were purchased directly from out-of-state, with an undetermined portion of the remainder being manufactured outside the state.

In Texas, all text books originate outside the state, and it is stipulated that "the major portion" of drugs and hospital equipment is either purchased directly from out of the state or is at least manufactured in other states.

The interstate flow of school and hospital supplies and equipment is, in large part, inevitable because of the non-diffusion of manufacturing supplies. For example, there are no Maryland suppliers for fourteen out of eighteen major categories of school supplies and equipment. Even larger States, such as Ohio and Texas, have no producers, or very few producers, of text books, science equipment and physical education equipment.

Not only do public schools and hospitals give rise to a large interstate flow of supplies and equipment, having a correspondingly substantial effect upon interstate commerce, public schools and hospitals are directly engaged in commerce and the production of goods for commerce by virtue of federal aid to education and health, involving billions of dollars. Over $4 billion is spent each year in federal grants, of which over $2 billion goes for elementary

and secondary public education, 50% of which is granted directly to local school districts under programs requiring extensive communications between local schools and regional and national facilities of the United States Office of Education. In the area of health services, federal expenditures during fiscal year 1965 amounted to $5 billion, while State and local government expenditures amounted to $4.9 billion. Included in the total of federal expenditures, are annual federal assistance of $260 million for the construction and enlargement of hospitals and other health facilities, annual medical research grants of over $600 million, and public health grants of $65 million to support State and local health agencies, both in operating costs and in programs for the control of disease. Additionally, the Social Security Administration during fiscal 1967 will pay out $2.35 billion for hospital services under the Medicare program, in which 94% of the hospitals in the country, both public and private, currently participate. Another 1 billion will be spent for direct reimbursement to hospitals and physicians for services to eligible patients. These programs create a regular interstate flow of funds to participating hospitals, extensive interstate communication and preparation of materials for interstate transmission by both local hospitals and state agencies, including engineering and architectural plans for hospital construction and enlargement, research data and reports, medical benefits claims, and numerous other types of reports and records.

"Ideas, wishes, orders and intelligence" are "subjects of commerce," *Western Union v. Lenroot,* 323 U.S. 490, 502-503 (1945), and the preparation of written documents and other materials for out-of-state transmission, as well as the actual interstate transmission of funds, documents and other communications, are all activities in commerce. *Beneficial Finance Co. v. Wirtz,* 346 F. 2d 340 (7 Cir. 1965); *Willmark Service System, Inc. v. Wirtz,* 317 F. 2d 486 (8 Cir. 1963), *cert. den.,* 375 U.S. 897 (1963); *Public Building Authority of Birmingham v. Goldberg,* 298 F. 2d 307 (5 Cir. 1962); *Mitchell v. Kroger Company,* 248 F. 2d 935 (8 Cir. 1957); *Aetna Finance Co. v. Mitchell,* 247 F. 2d 190 (1 Cir. 1957). Thus, from these activities, as well as the

out-of-state purchases and the receipt of interstate shipments which are either stipulated or inescapably must be inferred from the facts stated, the conclusion is inevitable that the activities of the states are "*in*" commerce, constitute the production of goods for commerce, or substantially affect commerce, although local in nature. Leaving aside for the moment the question of state sovereignty, I conclude that these activities are clearly within the power of Congress to regulate commerce.

The Enterprise Concept

The only authorities to pass on the constitutionality of the enterprise concept, *Wirtz v. Edisto Farms Dairy,* 242 F.S. 1 (D. S.C. 1965), and *Goldberg v. Ed's Shopworth Supermarket,* 214 F.S. 781 (W.D. La. 1963), have both sustained its validity. From my examination of the pertinent authorities, I am in accord with the result reached in those decisions and conclude that the enterprise concept embodied in the Fair Labor Standards Act in 1961, 29 U.S.C.A. § 203(r), represents a constitutionally valid exercise of the power of Congress to regulate commerce.

As I have recited, prior to 1961 the Fair Labor Standards Act applied only to those employees who themselves engaged in commerce or in the production of goods for commerce. By the provisions of the 1961 Amendments, *all* employees of various enterprises whose activities related to the movement of goods in commerce, including those engaged in selling, distributing or using goods that had previously moved in commerce became subject to the Act, subject, of course, to the exemptions contained in § 13 of the Act, 29 U.S.C.A. § 213.[14]

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[14] The 1961 extension of the Act's coverage had the effect of adding over four million workers to the twenty-four million previously within the Act's protection. This extension of coverage was the result of deliberate and lengthy consideration by at least two Congresses. (Senate Report No. 145, 87th Congress, First Session, pp. 2, 10; House Report No. 75, 87th Congress, First Session, pp. 2, 7). Exercise of the power to extend coverage was based upon the conclusion, discussed in detail in the Committee Reports of both the Senate and the House, that the additional coverage was necessary

Translated into a concrete example, the enterprise concept, as amended by the 1966 Amendments, means that in a private or public hospital the nurse's aid or maintenance worker, even though not engaged in commerce or in the production of goods for commerce, is subject to the minimum wage and overtime provisions of the Act if some employee of the hospital is engaged in commerce or in the production of goods for commerce, or handling goods in commerce. That Congress may constitutionally so extend coverage seems clear from the decided cases, of which Congress was fully aware when it first adopted the enterprise concept in 1961.[15] Indeed, it may properly be concluded that in adopting the enterprise concept Congress did not exercise to the limit its full power to regulate commerce, because application of the enterprise concept is conditioned upon the presence of some employee directly engaging in commerce, producing goods for commerce or handling goods in commerce. From the authorities it may be concluded that the enterprise concept could have been conditioned upon some employee engaging in local activity "affecting commerce" short of the actual interstate activity previously mentioned.[16]

One of the leading authorities pointing to the conclusions just stated is *Labor Board v. Reliance Fuel Corp.*, 371 U.S. 224 (1963), in which the National Labor Relations Board's jurisdiction over unfair labor practices committed by a retail distributor of fuel oil, all of whose sales were local where the retailer obtained the oil from a wholesaler who imported it from another state, was upheld. The conclusion resulted from the Court's construction of the

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to accomplish the Act's original purposes and was within the scope of the federal commerce power as evidenced by existing precedents under the National Labor Relations Act and other regulatory statutes.

[15] See e.g., Senate Report No. 145, April 10, 1961, 87th Congress First Session, 2 U.S. Code and Adm. News (87th Cong., 1st Sess., 1961), pp. 1622-1623.

[16] In this regard, the authorities cited in footnote 2, *supra*, all of which were decided prior to the 1961 Amendments are pertinent. They clearly indicate that prior to 1961, there were interstices in the Act which Congress could constitutionally fill. As pointed out in the text, they were only partially filled in 1961.

National Labor Relations Act to vest in the Board "* * * the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause" (*Id.*, at p. 226), and the citation of *Wickard v. Filburn, supra,* to support the conclusion that the distributor's activities affected commerce and were within the constitutional reach of Congress to regulate. Reference was also made to *Polish Nat. Alliance v. N.L.R.B.*, 322 U.S. 643 (1944), for the proposition that in enacting the National Labor Relations Act "* * * Congress had explicitly regulated not merely transactions or goods in interstate commerce, but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce." *Id.*, at p. 648.

Similarly, in *N.L.R.B. v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951); *Bldg. Trades Council v. Kinard Const. Co.*, 346 U.S. 993 (1954); and *Plumbers Union v. Door County*, 359 U.S. 354 (1959), the use of materials from out-of-state provided the basis for National Labor Relations Board jurisdiction with respect to the construction, respectively, of an office building, a court house and a housing project. See also, *San Diego Unions v. Garmon*, 353 U.S. 26 (1957); *Meat Cutters v. Fairlawn Meats*, 353 U.S. 20 (1957). See also, *Howell Chevrolet Co. v. N.L.R.B.*, 346 U.S. 482 (1953).

If the National Labor Relations Board may regulate the acts of the employer toward each employee of the fuel oil retail distributor and every construction worker on a building project without regard to whether that employee is directly engaged in interstate commerce simply because some goods are bought by the company out-of-state, it cannot be doubted that the nurse's aid or hospital maintenance worker likewise may be brought under the coverage of the Fair Labor Standards Act when someone employed by the hospital purchases drugs and equipment out-of-state, or purchases from local sources drugs and equipment which were produced out-of-state, or handles drugs and equipment originating from out-of-state, or the hospital engages in commerce in administering and carrying out a federal health grant or the program of Medicare, even

though the nurse's aid or maintenance worker himself does not carry on such activities. The same is true in regard to employees of schools, elementary, secondary, or institutions of higher learning, and specialized hospitals engaged in treatment of the mentally ill, those suffering from contagious diseases, the aged, or the handicapped.

It is a matter of elementary logic that the hospital and the school function as a result of the sum of all of the activities of all of their employees. The hospital administrator or the superintendent of education (himself exempt from the provisions of the Act), or his secretary, or some other employees, would have no occasion to engage in commerce, or the production of goods in commerce, if the services of the employees covered by the Act under the 1966 Amendments were permanently withdrawn. Their services are essential to the operation of the hospital or the school and, hence, their activities, although local in nature, substantially affect commerce, so that Congress may regulate the minimum wages to be paid them as well as the maximum hours they may be required to work without payment of overtime.

State Sovereignty

The precise claim of unconstitutional interference with state sovereignty made in this case has not been adjudicated by any court, because Congress has not heretofore attempted to regulate minimum wages and maximum hours (without overtime) for state employees. But from what has been decided in numerous other contexts analogous to the case at bar, and from the basis of those decisions, I can only conclude that the 1966 Amendments are valid and constitutional in their entirety. I have already referred to the cases in which the full extent of the power of Congress generally to regulate commerce has been developed. In every instance in which the exercise of this power has been applied to some state activity, the validity of the exercise has been upheld in language and on reasoning which, I am satisfied, sustains the validity of the 1966 Amendments. Because it on this aspect of the case that the States most vigorously attack the

validity of the 1966 Amendments, I am constrained to discuss these authorities fully.

Since the States are most vociferous in conjuring up the possible "horribles" of an adverse adjudication to them,[17] it is necessary, at the outset, to define what is — and what is not — presently before us. Before me is only the question of whether Congress may prescribe minimum wages and overtime for non-executive, non-professional and non-administrative employees of private and public hospitals, schools and related institutions. Congress has singled out this group which, experience has proved, is often underpaid and subjected to unreasonable work schedules and has required that its members be paid a minimum sum which, measured by the standards of contemporary society, is deemed a decent wage and that they not be compelled to work longer hours in a work period without payment of overtime than, by those standards, are deemed proper. These standards have been made applicable to private and public employees, alike. Congress has *not* sought to cover doctors, nurses, principals, teachers, research assistants, or the like. Nor has Congress sought to cover the governors, attorneys general, legislators, judges or policemen, who, some of the States assert, could eventually be covered if we upheld the validity of the 1966 Amendments.

Our consideration of the constitutional issue presented here cannot deal with hypothetical projections by the States of regulations yet to come. Our consideration of the States' contention that their sovereignty is impaired, and my conclusion that the 1966 Amendments are valid and constitutional, are limited to the 1966 Amendments and only those employees to which they extend, as are my previous conclusions that the power to regulate under the commerce clause exists and that the enterprise concept is constitutional. No court, and in particular no lower federal court, should attempt to adjudicate that which is not justiciable; all must steadfastly follow the rules set down by the Supreme Court governing the process of constitutional adjudication:

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[17] See *New York v. United States*, 326 U.S. 572, 583-584 (1946).

"The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power — 'the gravest and most delicate duty that this Court is called on to perform.' Marbury v. Madison (US) 1 Cranch 137, 177-180, 2 L. ed. 60, 73, 74. *This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.* In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' * * * Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. * * * In Barrows v. Jackson, 346 US 249, 97 L. ed. 1586, 73 S. Ct. 1031, this Court developed various reasons for this rule. Very significant is the incontrovertible proposition that it 'would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.' Id. 346 U.S. at 256. *The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.*" (emphasis supplied; footnote eliminated) *United States v. Raines*, 362 U.S. 17, 20-22 (1960).[18]

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[18] Although one of the best expressions of judicial self-restraint in the process of constitutional adjudication, *United States v. Raines, supra,* does not stand alone. It is only one of a line of decisions

As a first step in the decision of the limited question before me, it is necessary to put to rest any argument based upon the Tenth Amendment, as such. The Tenth Amendment is but a "truism" — "that all is retained which has not been surrendered." *United States v. Darby, supra,* at p. 124. Besides stating this self-executing formula, the decided cases are clear that the Tenth Amendment neither adds to nor detracts from the essential question to be decided in this case. *United States v. Sprague,* 282 U.S. 716, 733-734 (1931); *United States v. Appalachian Electric Power Company,* 311 U.S. 377, 428 (1940); *Oklahoma ex rel Phillips v. Guy F. Atkinson Co.,* 313 U.S. 508, 534 (1941); *Fernandez v. Wiener,* 326 U.S. 340, 362 (1945); *Case v. Bowles,* 327 U.S. 92, 101-103 (1946); *United States v. Oregon,* 366 U.S. 643, 649 (1961).

I turn directly to the cases where federal regulation under the Commerce Clause has been upheld, even when applied to an "essential" state activity. The principal authorities which must be considered are *Sanitary District v. United States,* 266 U.S. 405 (1925); *Board of Trustees v. United States,* 289 U.S. 48 (1933); *Case v. Bowles,* 327 U.S. 92 (1946); and the four related cases of *United States v. California,* 297 U.S. 175 (1936); *California v. United States,* 320 U.S. 577 (1944); *California v. Taylor,* 353 U.S. 553 (1957); and *Parden v. Terminal R. of Alabama Docks Dept.,* 377 U.S. 184 (1964). Also of interest, because it posed an issue of state sovereignty dispositive of this litigation, is *United States v. Ohio,* 385 U.S. 9 (1966).

The oldest and one of the most important cases is the *Sanitary District* case. This was a suit by the Attorney

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developing the concept which it so eloquently states: *Flint v. Stone Tracy Co.,* 220 U.S. 107 (1911); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 347 (1936) (concurring opinion, Brandeis, J.); *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450 (1945); *United Public Workers v. Mitchell,* 330 U.S. 75 (1947); *United States v. Spector,* 343 U.S. 169 (1952); *International L. & W. Union v. Boyd,* 347 U.S. 222 (1954). Additional authorities are cited in the portion of the opinion in *United States v. Raines, supra,* from which the quotation is extracted.

General of the United States to enjoin the Sanitary District of Chicago from diverting a volume of water from Lake Michigan in excess of that allowed by federal statute, although a state statute set a higher limit. The federal government asserted the taking to conflict with the power of Congress to regulate interstate and foreign commerce, and with a treaty with Great Britian concerning boundary waters of the Dominion of Canada; the Sanitary District defended on the grounds, *inter alia*, that public health required the taking of the additional quantity of water in accordance with the state statute, because otherwise it would be impossible to carry the city's sewage downstream.

Mr. Justice Holmes, speaking for a unanimous Court, held that the injunction should issue. He declared, basing the right to relief on the power of the federal government to regulate interstate and foreign commerce:

> "The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. *There is no question that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants.* In matters where the states may act, the action of Congress overrides what they have done." (Emphasis supplied.) *Id.*, at p. 426.

Following this he recited the evidence in detail, including that which clearly showed the sanitary needs of Chicago for the additional water, and concluded the opinion by stating:

> "* * * a large part of the evidence is irrelevant and immaterial to the issues that we have to decide. Probably the dangers to which the city of Chicago will be subjected if the decree is carried out are exaggerated; but, *in any event, we are not at liberty to consider them here as against the edict of a paramount power.*" (Emphasis supplied.) *Id.*, at p. 432.

Maryland argues that Chicago did not need the water for an "essential state function," but I conclude it difficult

to think of something more essentially sovereign or necessary to the welfare of the State and its people than sewage disposal; sewage disposal is as much a part of public health as hospitals for contagious diseases, and hospitals for the mentally ill. Yet, the Court stated in this context that when Congress exercised its power over interstate and foreign commerce, the welfare or needs of the inhabitants of the State *could not even be considered.* Maryland also argues that the case is distinguishable because it concerned a direct burden on commerce. The answer is that Congress has found that substandard wages and non-payment of overtime are also burdens on commerce and this finding has been judicially approved. *United States v. Darby, supra.*

Board of Trustees v. United States, supra, was a case in which the alleged conflict between the exercise of the power of Congress to regulate commerce and the concept of state sovereignty arose where the State was exercising its sovereignty to provide higher education. The University of Illinois imported scientific apparatus for use in one of its educational departments, and it sued to obtain a refund of duties exacted on the importations. For a unanimous Court, Chief Justice Hughes held that the power of the federal government over goods moving in foreign commerce is plenary, that the State in the performance of state functions might not limit the exercise by Congress of its power, and that the duties were properly laid.

In arriving at this result, the Court recognized that the federal government has the power to tax, including the power to lay duties, and that it has the power to regulate commerce. The existence of the taxing power was stated not to foreclose Congress from laying duties in the exercise of its power to regulate commerce, and the Court concluded that the duties in question were laid in the exercise of the power to regulate commerce and not in the exercise of the taxing power. Having reached that conclusion, the Court then dealt with the argument that in the exercise of the commerce power, Congress was limited by notions of state sovereignty as it was when it exercised its taxing power:

"The principle invoked by the petitioner, of the immunity of state instrumentalities from Federal Taxation, has its inherent limitations. * * * It is a principle implied from the necessity of maintaining our dual system of government. * * * Springing from that necessity it does not extend beyond it. Protecting the functions of government in its proper province, the implication ceases when the boundary of that province is reached. The fact that the State in the performance of state functions may use imported articles does not mean that the importation is a function of the state government independent of federal power. The control of importation does not rest with the State but with the Congress. *In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power. There is thus no violation of the principle which petitioner invokes, for there is no encroachment on the power of the State as none exists with respect to the subject over which the Federal power has been exerted.* To permit the States and their instrumentalities to import commodities for their own use, regardless of the requirements imposed by the Congress, would undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create. *It is for the Congress to decide to what extent, if at all, the States and their instrumentalities shall be relieved of the payment of duties on imported articles.*" (Emphasis supplied.) *Id.*, at p. 59.

Significant also for the case at bar, is the earlier statement of the Court in which it described the power of Congress over interstate and foreign commerce:

"It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action. * * *.

"* * * *The principle of duality in our system of government does not touch the authority of the Congress in*

the regulation of foreign commerce." (Emphasis supplied.) *Id.*, at pp. 56-57.

Maryland seeks to escape the language in this opinion by the apparent argument that the case involved Congress' power over foreign commerce and the express argument that the power of Congress over commerce would not be limited if recognition were given to state sovereignty over public schools and hospitals. Of course, the Court was writing in the field of foreign commerce, but the power of Congress over foreign commerce is no more plenary and no more exclusive than its power over commerce between the states, the latter including the power to regulate local activities which have a substantial effect on interstate commerce. *Wickard v. Filburn, supra.* The States lack any power to regulate commerce as such; it follows that there can be no interference with state sovereignty over interstate commerce because none exists. Where Congress had extended the Act to certain employees of public schools and hospitals, to hold that Congress may not validly do so necessarily limits the power of Congress. The opinion's specific and peremptory rejection of the assertion that "state functions" can isolate a state or its instrumentalities from federal regulation surely goes a long way to support the validity of the 1966 Amendments. The specific and peremptory rejection of the argument that the principle of duality in our system of government may limit in any way the authority of Congress to regulate commerce is dispositive of the present case.

Case v. Bowles, supra, only repeats the clear implications of the *Sanitary District* and *Board of Trustees* cases. In *Case*, a suit for injunction was brought to restrain the State of Washington from selling timber on school lands at prices in excess of those fixed by regulation adopted under the Emergency Price Control Act. The State alleged, in defense of the action, that price controls could not be applied to it because the sale was "for the purpose of gaining revenue to carry out an essential governmental function — the education of its citizens." *Id.*, at p. 101.

This argument was rejected and price controls held applicable to the State in the following language:

"We now turn to petitioner's Constitutional contention. Though as we have pointed out petitioners have alleged that the Act applied to setting a maximum price for school-land timber violates the Fifth and Tenth Amendments, the argument here seems to spring from implications of the Tenth Amendment only. *The contention rest on the premise that there is a 'doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.'* It is not contended, and could not be under our prior decisions, that the ceiling price fixed by the Administrator is Constitutionally invalid as applied to privately owned timber. * * * Nor is it denied that the Administrator could have fixed ceiling prices if the state had engaged in a sales business 'having the incidents of similar enterprises usually prosecuted for private gain.' * * * But it is argued that the Act cannot be applied to this sale because it was 'for the purpose of gaining revenue to carry out an essential governmental function — the education of its citizens.' Since the Emergency Price Control Act has been sustained as a Congressional exercise of the war power, *the petitioner's argument is that the extent of the power as applied to state functions depends on whether these are 'essential' to the state government. The use of the same criterion in measuring the Constitutional power of Congress to tax has proved to be unworkable, and we reject it as a guide in the field here involved.*" (footnote eliminated; emphasis supplied.) *Id.*, at p. 101.

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"Where as here, Congress has enacted legislation authorized by its granted powers, and where at the same time, a state has a conflicting law which but for the Congressional Act would be valid, the Constitution marks the course for courts to follow. Article

> VI provides that 'The Constitution and the Laws of the United States * * * made in pursuance thereof * * * shall be the supreme Law of the Land * * *.'" (footnote eliminated) *Id.*, at pp. 102-103.

Case v. Bowles may not be summarily rejected, as it is by Maryland, on the ground that "the real sovereignty of the State was not infringed" and the case arose under the war power of Congress. The power of Congress to regulate commerce is no less plenary and no less exclusive than the power to make war under which the Emergency Price Control Act was adopted. While price limitation on the sale of timber to support public education, in degree, might be less discommoding than fixing wages of certain state employees, the Court's rejection of the "essential" functions argument is of extreme significance; the rejection goes to the very heart of this case.

The line of cases beginning with *United States v. California, supra,* may appear to be distinguishable from the instant case on the ground that each involved state activities which do not fall within the concept of essential governmental functions. Yet the essential nature of the state activity and the sovereignty of the state was interposed as a defense in each of them and rejected by the Court, not on the ground that the activity was not essential but on the ground that the "essential" concept was not a good defense. Thus, the cases are additional authority for concluding that the States' argument here is lacking in merit.

In *United States v. California* the question was whether a terminal railroad owned and operated by a State for the purpose of facilitating the commerce of a port, all of the revenues of which were used to improve port facilities, could be subjected to the Federal Safety Appliance Act, so that the penalty prescribed by that Act for its violation could be recovered from the State of California.[19]

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[19] It is interesting that in an earlier suit, *Sherman v. United States,* 282 U.S. 25 (1930), involving the same belt railroad, Mr. Justice

California urged these activities were not subject to the Act because "* * * it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement * * * it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act." *Id.*, at p. 183. Mr. Justice Stone (later Chief Justice), speaking for a unanimous Court, specifically rejected this argument and sustained the imposition of the penalty, stating:

> " * * * we think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity. That in operating its railway it is acting within a power reserved to the states cannot be doubted. * * * The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. * * * In each case the power of the state is subordinate to the constitutional exercise of the granted federal power." *Id.*, at pp. 183-184.

In addition to announcing the absolute supremacy of the power of Congress to exercise its authority to regulate commerce despite the defense of state sovereignty, the Court rejected an argument that the commerce power is circumscribed by state sovereignty, as is the taxing power. It said:

> "The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is

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Holmes said: "California has not gone into business generally as a common carrier, but simply has constructed the Belt Line as an incident of its control of the harbor — a state prerogative." *Id.*, at p. 29.

> implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power * * * which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. * * * Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. *But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.*" (Emphasis supplied.) *Id.*, at pp. 184-185.

In *California v. United States, supra,* an order of the United States Maritime Commission requiring elimination of preferential and unreasonable practices, i.e., excessive free time and non-compensatory charges for services, was held enforceable against the State of California and the Board of State Harbor Commissioners for San Francisco Harbor. California defended its non-compliance with the order on the ground that the Act under which it was issued had no application to public owners or wharves and piers. This question of statutory construction was decided against its contention, with the Court adding:

> "* * * it is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade as the activities and instrumentalities which were here authorized to be regulated by the Commission, whether they be the activities and instrumentalities of private persons or of public agencies." *Id.*, at p. 586.

The belt railway which was the subject of litigation in *United States v. California, supra,* was also the subject of litigation in *California v. Taylor, supra.* In the latter the

question was whether the Railway Labor Act was applicable to the *employer-employee relationship* between the State of California and its employees engaged in operating the railroad. Notwithstanding that California provided that its employees had no right to bargain collectively with it concerning terms and conditions of employment, the Railway Labor Act was held applicable on the principle that a state may not prohibit the exercise of rights which the federal labor relations acts protect. As in the earlier cases, California asserted the Act, if held to apply to it, invalidly interfered with its sovereign immunity, but the Court rejected this contention, saying:

> "Finally, the State suggests that Congress has no constitutional power to interfere with the 'sovereign right' of a State to control its employment relationships on a state-owned railroad engaged in interstate commerce. In United States v. California (U.S.) supra, this Court said that the State, although acting in its sovereign capacity in operating this Belt Railroad, necessarily so acted 'in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government.' 297 U.S., at 184. 'California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers. . . .' Id. 297 U.S., at 185. That principle is no less applicable here. If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships." *Id.*, at p. 568.

A similar result was reached in *Parden v. Terminal R. of Alabama Docks Dept., supra,* where Alabama's plea of sovereign immunity was rejected in a suit brought against it under the Federal Employer's Liability Act by an employee of a railroad which it owned and operated. The decision proceeded on the dual grounds that when Congress was empowered to regulate commerce, the States neces-

sarily lost any portion of their sovereignty that would stand in the way, and that Alabama waived its protection against suit by an individual, as embodied in the Eleventh Amendment, by operating an interstate railroad approximately twenty years after enactment of the Federal Employers' Liability Act.[20]

In *United States v. Ohio, supra,* the question was whether the State of Ohio was liable to the United States for penalties under the Agricultural Adjustment Act of 1938 for growing wheat on state-owned farms in excess of federally-imposed acreage allotments. Specifically, the wheat was grown on a prison farm as part of a program of individual therapy and rehabilitation. It was consumed exclusively on the farm; indeed, by the Ohio Constitution it could neither be "sold, farmed out, contracted or given away." The Sixth Circuit Court of Appeals held that the growing of wheat and consumption of the crop by the inmates of the institution could not have any substantial effect on interstate commerce and, hence, that the Act was inapplicable. 354 F. 2d 549 (1965). The judgment was summarily reversed in a *per curiam* opinion on the authority of *Wickard v. Filburn, supra.*

The *Ohio* case had present all of the factors relied on here by the States to invalidate the 1966 Amendments.

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[20] Three decisions of United States Courts of Appeals in this area are worthy of note. *United States v. Feaster,* 330 F. 2d 671 (5 Cir. 1964), held that the National Mediation Board, acting under the Railway Labor Act, could require the state agency which operated state-owned dock facilities to produce its employment records for inspection by a union. In *State of Colorado v. United States,* 219 F. 2d 474 (10 Cir. 1954), it was held that Colorado State Board of Stock Inspection was subject to the registration requirements of the Packers and Stockyards Act, and to the payment of penalties under the Act, "the same as are private persons or agencies," notwithstanding that inspection was conducted "in its sovereign capacity as a state." *Id.,* at p. 477. The most recent decision in this regard is *N.L.R.B. v. Local 254, Building Service Employees International Union,* ___ F. 2d ___ (1 Cir. 4/10/67), holding that for purposes of the National Labor Relations Act the Department of Education of the State of Massachusetts was "a person engaged in commerce" and "an employer" as defined in the Act.

Nothing could be more essential or a more sovereign governmental function than providing places of detention for those convicted of crimes. The performance of such a state function neither produces income nor competes with any private enterprise. Likewise, it is a function which can in no way be provided by private enterprise. The case was decided by the Court of Appeals on the commerce issue without reaching the asserted issue of impairment of state sovereignty and we are advised that in the briefs presented to the Supreme Court the latter contention was not made. While the case is conclusive authority for determination of the scope of the power of Congress to regulate commerce, it is not necessarily determinative on the issue of impairment of state sovereignty.

In asserting boundaries to federal regulation under the Commerce Clause, the States claim support for the result they advocate in *New York v. United States*, 326 U.S. 572 (1946), and other cases which have held the power of Congress to tax is subject to limitation. It should be noted at the outset that in the *New York* case there was no opinion of the Court, and reliance is placed upon one of the opinions concurred in by only four justices. But the weakness of this authority lies not in the lack of unanimity of the Court, but rather in the fact that other decisions before and after *New York* establish that an unqualified analogy between the taxing power and the commerce power cannot be made. Parenthetically, it should also be noted that in *New York* the claim of state sovereignty was rejected and the validity of the tax upheld. The *Sanitary District* case, *supra*, decided in 1925, and *Board of Trustees v. United States*, decided in 1933, clearly imply that Congress's power to regulate commerce and Congress's power to tax are not coterminus. *Case v. Bowles*, decided the same term as, but after, *New York v. United States*, specifically rejects limitations on the war power such as were suggested on the taxing power by dictum in some of the opinions in the *New York* case. On the other hand, when the power of Congress to regulate commerce is being considered, *United States v. California*, decided ten years before the *New York* case, is specific in saying that the test of validity of

regulation under the Commerce Clause is different from the test of the validity of federal taxation touching upon state sovereignty. See also, *United States v. Kahriger*, 345 U.S. 22 (1953).

These cases demonstrate that the taxing power and the commerce power have been viewed by the Supreme Court as having different limitations, because of the concurrent nature of the former, and the plenary nature of the latter. In sharp contrast, stand the statements of the Court that the power of Congress over war and over commerce, both foreign and interstate, are plenary. Because each is plenary, the war and commerce powers of Congress are necessarily coterminus, and *Hopkins Federal Sav. & L. Assn. v. Cleary*, 296 U.S. 315, 343 (1935), so suggests. Thus, cases decided under any of the plenary powers are precedents for similar situations arising under one of the other plenary powers, while cases decided under the taxing power are weak authority for determining the limits of the exercise of a plenary power. While an attempt is made to distinguish *Case v. Bowles* on the grounds that it concerned the war power, and to distinguish the *Board of Trustees* case on the grounds that it concerned the power to regulate foreign commerce, patently, these powers are plenary, coterminus and indistinguishable from the power to regulate interstate commerce. Indeed, while asserting that the cases are distinguishable, the States fail to cite one case holding that these powers are not equally plenary and coterminus; at the same time, the States fail to cite one case holding that the commerce power is restricted to the same area as the taxing power.

Hopkins Federal Sav. & L. Assn. v. Cleary, 296 U.S. 315 (1935), urged on the Court by the States, should also be noticed. In the *Hopkins* case, a federal statute which permitted state building and loan associations to become federal building and loan associations without state consent was held invalid. The Congressional power under which the statute had been adopted was deemed by the Court to be concurrent with a similar state power. As a consequence, the Court, consonant with its approach in taxing cases, where *concurrent* powers were also involved, drew a line

between federal and state sovereignty in holding that the statute unconstitutionally transgressed state sovereignty, but in doing so, it was careful to state: *"We are not concerned at this time with the applicable rule in situations where the central government is at liberty (as it is under the Commerce Clause when such a purpose is disclosed) to exercise a power that is exclusive as well as paramount."* (Emphasis supplied.) *Id.*, at p. 338. Thus, not only does the *Hopkins* case *not* constitute authority for the contention urged by the States, but the care with which the Court delineated the problem before it strongly suggests a contrary result had the legislation been an exercise of the power of Congress to regulate commerce. It is at most additional authority for the result I would reach.

The States, in the stipulations which we earlier mentioned, have presented extensive evidence to show the far-reaching financial impact on them of the 1966 Amendments. The proof tends to show that the graduated financial burden, resulting from escalation of the minimum wage and contraction of maximum hours without payment of overtime over a period of years, will necessitate either increased taxes or a curtailment of essential services. There is before us evidence that current budgetary appropriations will be insufficient to meet the increased costs resulting from the 1966 Amendments during the current fiscal period, and that in many instances, political subdivisions, restricted by organic law to maximum limits of taxation and borrowing, are currently operating at these maxima so that, absent grants-in-aid or an amendment of organic law, they will be required to curtail the amounts spent for teachers, text books and the like, or reduce the number of people served, if they are required to comply with the 1966 Amendments.

As I said earlier, this data is not excluded on evidentiary principles. It is properly before us — if only to put flesh on the skeletal frame of this litigation. But, in the decision of the constitutional issues presented to us, it, and the arguments of unconstitutional impairment of state sovereignty predicated upon it, are largely irrelevant. I have concluded that the 1966 Amendments are valid and constitutional, as is the enterprise concept of the 1961 Amend-

ments, and that there is no unconstitutional impairment of the sovereignty of the plaintiff States. The financial impact of the 1966 Amendments on the States is an argument to be addressed to Congress and not to the courts. As Chief Justice Marshall authoritatively stated in *Gibbons v. Ogden*, 9 Wheat. 1 (1824):

> "If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. *The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.*" (Emphasis supplied.) *Id.*, at p. 197.[21]

Even more specific in stating the principle that the financial impact of the 1966 Amendments is no guide to their validity is *Oklahoma ex rel Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941). In that case, the federal government planned to flood certain lands belonging to Oklahoma. The state sought an injunction, arguing, *inter alia*, that the project as planned would take much land unnecessarily, without serving the purpose of the dam. The Court declared:

> "Such matters raise not constitutional issues but questions of policy. They relate to the wisdom, need, and

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[21] The vitality of the principle announced has not been eroded by time. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964); *Polish Alliance v. N.L.R.B.*, 322 U.S. 643, 650 (1944); *Oklahoma ex rel Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 527-528 (1941); *Sanitary District v. United States*, 266 U.S. 405, 432 (1925).

effectiveness of a particular project. They are, therefore, questions for the Congress not the courts. * * * *Nor is it for us to determine whether the resulting benefits to commerce as a result of this particular exercise by Congress of the commerce power outweighs the costs of the undertaking.*" (Emphasis supplied.) *Id.*, at pp. 527-528.

To a further allegation that tax revenues of Oklahoma would be diminished because of loss of property taxes on the seized land, and the public education might be hampered because certain school buildings, on the condemned land, would have to be rebuilt elsewhere, the Court said:

"*The possible adverse effect on the tax revenues of Oklahoma as a result of the exercise by the federal government of its power of eminent domain is no barrier to the exercise of that power.*". (Emphasis supplied.) *Id.*, at p. 534.[22]

I conclude that defendants' motion for summary judgment should be granted, but in view of the fact that my conclusions are shared only in part by Chief Judge Thomsen, and not at all by Judge Northrop, counsel may present a form of decree declaring the minimum wage provisions of the 1966 Amendments valid and constitutional and denying plaintiffs' prayers for injunctive relief.

HARRISON L. WINTER,
United States Circuit Judge.

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[22] Although not as explicit, several of the authorities discussed in the text support the rule that when the commerce power is exercised the test of validity of the exercise is *not* the cost to the States. In *California v. Taylor, supra,* the State was exposed to payment of the higher wages for state employees arrived at as a result of collective bargaining rather than the scale prescribed by state fiat. The result of the decision in *United States v. Ohio, supra,* would be presumably to increase the state's cost for wheat and flour supplies purchased from the market place rather than grown on the prison farm. In *Case v. Bowles, supra,* price controls on the sale of timber decreased school revenues so that services would have to be reduced or school taxes increased. The penalties exacted in *United States v. Ohio, supra,* and *United States v. California, supra,* represented a diminution of general state revenues otherwise available to support other state activities.

THOMSEN, Chief Judge, concurring in part:

I agree with the conclusion reached by Judge Winter — that the injunction requested by plaintiff should be denied — but for somewhat different reasons and with one important reservation. I agree that the operation of schools and hospitals by the several States and their subdivisions affects interstate commerce to a substantial degree, whether or not such operations themselves constitute interstate commerce, and that use of the "enterprise concept" does not itself render unconstitutional the 1966 Amendments to the Fair Labor Standards Act. The potential Eleventh Amendment problems, suggested by the States, should be considered as they may arise in subsequent actions against the several States. But I cannot agree that the power of the federal government to regulate essential sovereign functions of the States is absolute and unqualified, despite the broad language of the opinions cited by Judge Winter.

When the thirteen sovereign States adopted the Constitution they gave up only part of their severeignty to the United States of America. The system created by the Constitution was and is a federal system; the States are not administrative divisions of a central government. For reasons which were reviewed by Judge Wisdom in *United States v. Manning*, W.D. La., 215 F. Supp. 272 (1963), and are not disputed, the Tenth Amendment was adopted in 1791. To characterize that Amendment as a "truism" does not mean that it was intended to be devoid of meaning, lulling the States into acceptance of a national government which may, without further amendment to the Constitution, take away from the States the substance, if not the trappings, of the sovereignty which they intended to preserve. The Tenth Amendment makes explicit the principle of federalism, which recognizes the supremacy of the federal government with respect to the powers delegated to it, but also recognizes that the States retained certain sovereign powers. The sovereign powers retained by the States are not specified in the Tenth Amendment or in any other provisions of the Constitution; they are limited

only by the scope and thrust of the powers delegated to the federal government.

The power to regulate interstate commerce delegated to the federal government has been held to be "plenary" and has been accorded a very wide range by the Supreme Court. The cases in which the extent of the commerce power has been discussed in relation to the Tenth Amendment fall into two categories: those in which the regulation was being applied to and challenged by a party other than a State or a political subdivision, and those in which the regulation was being applied to and challenged by a State itself or by a political subdivision of a State.

In the first category, the pendulum has swung away from decisions[1] which restricted the commerce power. Since 1937 the Supreme Court has consistently held that the federal regulatory power under the commerce clause may control intrastate activities which merely affect commerce.[2]

The cases involving federal regulation of activities engaged in by the States or their subdivisions have been analyzed in Judge Winter's opinion. Some of them involved the competing interests of several States,[3] the treaty power,[4] the power over foreign commerce,[5] or the war power.[6] Others involved the operation by a State of a

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[1] *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

[2] *United States v. Darby*, 312 U.S. 100 (1941); *N.L.R.B. v. Jones & Laughlin*, 301 U.S. 1 (1937); see also *Wickard v. Filburn*, 317 U.S. 111 (1942); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

[3] *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

[4] *Sanitary District of Chicago v. United States, supra.*

[5] *Board of Trustees of University of Illinois v. United States*, 289 U.S. 48 (1933).

[6] *Case v. Bowles*, 327 U.S. 92 (1946).

railroad,[7] a waterfront terminal[8] or the dominion which the federal government has, "to the exclusion of the states," over navigable waters of the United States.[9] The opinions in some of those cases state the power of the federal government over interstate commerce in broad and unqualified terms, indicating that when Congress exercises its power over interstate commerce, the welfare or needs of the States need not even be considered. The broad language of the opinions must, however, be read in the context of the cases in which they were rendered. In none of those cases were the essential taxing and budgetary functions of the States so seriously affected as they are by the statute under consideration. We must heed the admonition in *Gomillion v. Lightfoot*, 364 U.S. 339, at 343-344: "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretative process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts."

The question remains: Does the principle of federalism, implicit in the Constitution as originally drawn, and made explicit by the Tenth Amendment, prevent Congress from regulating, in the manner provided by the 1966 Amendments, the operation of public schools and hospitals by the States and their subdivisions?

The States cite a number of cases arising under the taxing power, to the effect that the taxing power is subject to limitations imposed by the principle of federalism, and argue that similar limitations apply to the commerce power. Limitations on the taxing power have been recognized when the exercise of that power would unduly inter-

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[7] *United States v. California*, 297 U.S. 175 (1936); *California v. Taylor*, 353 U.S. 553 (1957); see also *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964).

[8] *California v. United States*, 320 U.S. 577 (1944).

[9] *City of Tacoma v. Taxpayers*, 357 U.S. 320 (1958); *State of Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

fere with the governmental activities of the States.[10] "This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system." *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 575 (1931).[11] The States argue that the reach of the commerce power is no greater than the reach of the taxing power, citing a statement from one of the opinions in *New York v. United States*, 326 U.S. 572, 582 (1946): "Surely the power of Congress to lay taxes has impliedly no less a reach than the power of Congress to regulate commerce." It must be recognized, however, that a limitation has been placed upon the taxing power which has not yet been placed upon the commerce power.

In another opinion in *New York v. United States*, Chief Justice Stone, concurring for himself and three other Justices, stated:

> "* * * we are not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individuals alike. * * * [A] federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government. * * *" 326 U.S. at 586-587.
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> "The problem is not one to be solved by a fomula, but we may look to the structure of the Constitution as our guide to decision. * * *" 326 U.S. at 589.

The limitation on the taxing power — undue interference with a State's performance of its sovereign functions of government — responds to Chief Justice Marshall's famous dictum: "The power to tax involves the power to destroy". *McCulloch v. Maryland*, 4 Wheat. 316, 431

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[10] *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477, 478 (1939).

[11] See also *New York v. United States*, 326 U.S. 572, 577 (1946); *Willcuts v. Bunn*, 282 U.S. 216 (1931).

(1819). The potentially destructive power of taxation lies in the ability of one sovereign to impose an economic burden upon the functions of the other too great to be borne, thereby curtailing or eliminating a particular activity.

Taxation is not the only way in which the federal government may destroy or cripple essential State functions. There must be some limit beyond which the federal government cannot go in its attempt to exercise against the States themselves the power of the federal government over interstate commerce. Neither the Solicitor of Labor, who argued the case for all the defendants, nor Judge Winter in his opinion, denies that there may be some limit, but they argue and hold respectively that whatever limit there may be has not been exceeded in this case.

The proper limit is indicated, though not fixed, by the statement of Chief Justice Stone, quoted above, that "a federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." The attempted exercise against a State of the power of the federal government over interstate commerce should face the test: does it interfere unduly with the State's performance of its sovereign *and indispensable* functions of government? If the concept of federalism is to survive, it must stand on constitutional limitations, not on the sufferance of the federal government.

When the federal government invokes the commerce power, unaided by the Fourteenth Amendment or any other constitutional provision, to regulate the relations between a State and state employees who are not themselves engaged in interstate commerce or in the production of goods for commerce, the Court should consider a number of factors in determining the constitutionality of the proposed regulation. The Court should give weight and deference to any congressional findings with regard to the effect which the action sought to be regulated has on interstate commerce. The Court should also consider whether

the activity subject to the proposed regulation is an important function of the State and its political subdivisions; whether the service in question is offered or might be offered to the same extent and on substantially the same terms by private enterprise or other non-state sources; and whether such regulation would seriously interfere with the State's performance or regulation of its indispensable sovereign functions.

The statute enacting the 1966 Amendments contains no congressional findings with respect to the relationship between interstate commerce and the proposed coverage of state employees.[12]

The operation of public schools and hospitals is undoubtedly one of the most important functions of State governments. The Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), stated flatly: "Today, education is perhaps the most important function of state and local governments." The importance of public hospitals to the community is also beyond dispute.

Public hospitals in many instances provide service otherwise unavailable.[13] The public schools and hospitals could

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[12] Findings with respect to labor conditions in industries engaged in commerce or in the production of goods for commerce, were included in the original Fair Labor Standards Act, see 29 U.S.C.A. 20,2(a).

[13] In Maryland 867 beds, all publicly owned and operated, constitute the total facilities for tubercular care in the State of Maryland. A similar situation exists in Texas. Under Texas law, on the discovery of tuberculosis the patient can be committed to a state hospital until the disease is no longer communicable. But non-state hospital beds for tubercular patients are virtually non-existent and the few that are available are extremely expensive. Similarly, approximately 90% of the facilities for the mentally disturbed and mentally retarded in Maryland are provided by the State, and, undoubtedly, much the same proportion applies in other States. Moreover, it is the public hospital which bears the main burden of providing care for the indigent. In Texas, for example, most of the people in State mental institutions are charity or near charity patients. In the Texas tubercular hospitals only nine out of 2,900 patients paid for the complete cost of their hospital care in 1966. The necessity of keeping

not be replaced by nongovernmental enterprises.[14] The alternative would be federal schools and hospitals, and no one has argued for that.

From the mass of evidence submitted to the Court pursuant to stipulation, it is clear that the impact of the 1966 Amendments on the States is far-reaching. The Act imposes upon the States a graduated financial burden, which will necessitate either increased taxes or a curtailment of the services now bing rendered by the States and their political subdivisions. Most of the States must operate out of current funds provided by budgetary appropriations,[15]

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the mentally disturbed and those ill with communicable diseases away from the community at large is too obvious to require elaboration.

[14] In Maryland approximately 80% of the total number of secondary and elementary school students are enrolled in public schools. In Texas and Ohio the comparable figures are approximately 86% and 84% respectively. The great majority of the other schools are either parochial or religiously affiliated. In Maryland public institutions of higher education served 74% of the students enrolled toward degree credit. In Texas and Ohio the comparable figures were 77% and 63% respectively. In 1965 over half the hospital beds in Maryland were located in hospitals operated by State and local governments. It is true, as defendants note, that these hospitals accounted for only 15% of the total admissions, but that figure reflects their role in treating the chronically ill and long-term mental and tubercular patients. In Texas, State hospital beds account for almost half the total number of beds in all Texas hospitals, and for about 25% of the admissions. State and local government hospitals in Ohio provided almost half the total number of hospital beds in the State and accounted for about 15% of the admissions.

[15] Thus, Texas represents to the Court that in order to meet the standards of the Fair Labor Standards Act the expenditures of the Texas Youth Council will be increased by over $3,000,000 annually; the Department of Mental Health and Mental Retardation will need an additional $7,500,000 annually; the cost of the Institutions of Higher Education will go up over $3,250,000 annually and the Fort Worth Independent School District will need by 1971 to find additional tax revenue sources for approximately $575,000 annually. Even though the Fort Worth District is one of the larger districts in the State, there are over 1,300 other Independent School Districts whose cost will be increased proportionately and who also must find additional sources of revenue. Many of these districts have reached their constitutional tax rate limit as well as property value limitations.

and in many instances the responsible political subdivisions, notably school districts, are taxing at their constitutional maximum and would have to curtail the amounts spent for teachers, textbooks and the like, or reduce the number of people served, unless and until the State constitution is amended.

Nevertheless, I cannot say that the minimum wage provisions interfere so *unduly* with the State's performance of their indispensable sovereign functions as to make those provisions unconstitutional. It is of course true, as Judge Northrop points out, that the minimum wage provisions interfere with the budgetary function of the States. But that interference must be weighed against the interest of the federal government, representing all the people of the United States, in seeing that all the people are paid an appropriate minimum wage. Serious problems are presented by the possible application of the Act to work done by inmates of correctional and other institutions as part of their education or rehabilitation programs, but I agree with the Solicitor of Labor that these can best be handled by the regulations or on a case by case basis, and do not justify a sweeping injunction.

The overtime provisions present a more serious problem. Unlike the minimum wage provisions, the overtime provisions are not limited to the lowest paid employees. Many State functions, including some which are affected by the 1966 Amendments, require work arrangements other than the standard 40-hour work week. Public school, college and university personnel, who generally receive lengthy vacations, must often work longer than 40 hours per week during some part of the school year. The statute under consideration makes some provision in this regard for the employees of hospitals, whose round-the-clock requirements do not fit comfortably into a 40-hour work week.[16] A common practice has been to give these and other State employees compensatory time, or to make various other budgetary arrangements to keep in fair balance State jobs of the most diverse character. If the overtime provisions

[16] 29 U.S.C.A. 207(j) (1966 Cum. Supp.).

of the 1966 Amendments are valid, many of those arrangements may no longer be possible. The Act will seriously hamper the organizational and budgetary functions of the States by forcing them to favor employees of their hospitals and schools over other programs such as welfare and law enforcement, unless the States rearrange their entire civil service and appropriate additional sums for employees not covered by the Act.

For reasons stated above, I am satisfied that a line must be drawn, and that with respect to some if not all state employees covered by the 1966 Amendments the overtime requirements of the Act probably go beyond the permissible limits. The interference with the organizational and budgetary functions of the States has been noted. On the other hand, Congress has not stated, and neither the committee hearings nor the stipulated facts in this case show, what if any effect on interstate commerce the overtime practices of the several States may have. The issue in each instance is whether the particular regulation *unduly* interferes with one or more indispensable sovereign functions of the State. This indicates that the question whether the application of the overtime provisions of the statute to state employees goes beyond the permissible limits should be decided in the context of particular cases, when the extent of the interference with an indispensable state function can be weighed against the effect, if any, which the State's overtime practices have on interstate commerce.[17]

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[17] At the hearing of this case the Solicitor of Labor argued for all of the defendants. He was asked from the Bench whether and where a line should be drawn. Without conceding that any line should be drawn in this case, and without withdrawing from his position that the plenary power of the federal government over interstate commerce applies to the States as well as to individuals, the Solicitor suggested: "* * * we have such a variety of situations that it may not be the path of wisdom to try to issue any blanket rule [to cover] the variety of different situations demonstrated [by the stipulations with respect to] Maryland, Ohio and Texas, and which can be assumed to exist in a multiplicity of cases throughout the fifty states." Tr. p. 193. The Solicitor concluded "that this is not the appropriate place and case for blanket injunctions or orders on a blanket basis so far as the application of this rule to schools

I conclude that a sweeping injunction at this time would not be proper.

The denial of relief in this case should be without prejudice to the right of the several States and their political subdivisions to challenge the overtime provisions of the Act applicable to employees of the States and their political subdivisions, in future cases presenting specific situations.

NORTHROP, District Judge, dissenting

I am compelled to dissent from the conclusions reached by Judge Winter and Judge Thomsen that this Act is not unconstitutional.

The majority recognizes that this is a case of first impression involving a conflict between Congress' power under the Commerce Clause and state sovereignty as recognized in our Constitution.

Judge Winter concludes that the power of Congress under the Commerce Clause has no boundaries and Congressional preemption in this field is supreme, it mattering not that it would destroy the constitutionally recognized sovereignty of the states. To put it simply, he holds that from the beginning federalism, as embodied in our Constitution, existed by the will of Congress rather than by the will of the people. No case has gone that far. It is supported neither by history nor by the structure of the Constitution.

In his concurring opinion, Judge Thomsen recognizes that there is implicit within the concept of federalism embodied in the Constitution a limitation on the power of

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and hospitals are concerned. Instead, it would seem most appropriate if such a new line were conceived and fashioned, if it should be, that the concept and the fashioning of it should not be for this Court, but by the Supreme Court in any later proceedings, or perhaps, as I have suggested several times before, it should be done as cases actually come up in the future and action is taken where we can get a full exposure of all of the different facts and facets on issues that may well be presented at that future time." Tr. pp. 204, 205.

Congress under the Commerce Clause. However, he feels that the minimum wage provisions of the Act as they affect the states do not transgress the limitation imposed by the Constitution upon Congress. But he expresses serious doubts as to the constitutionality of the overtime provision of the Act as it affects the states. Nevertheless he concludes that question is not yet ripe for adjudication. As to it, he would wait until the Department of Labor promulgates and applies its regulations to the states and decide constitutionality on a case-by-case basis.

Although I agree with Judge Thomsen's analysis of the pertinent cases and some of his reasoning as to the effect of the amendment on the states, I cannot agree with his conclusions. Unless the Department of Labor emasculates the Act, there will be no way for this or some other court to avoid the constitutional question posed herein.

The question before us is whether this Congressional exercise of power under the Commerce Clause constitutes an undue infringement upon the "performance of [the state's] function as a government which the Constitution recognizes as sovereign."

This quotation is from Chief Justice Stone's opinion in New York v. United States, 326 U.S. 572, at 588, 66 S. Ct. 310, at 317, in reference to the limits on the taxing power of Congress. Although it is recognized that the power under the Commerce Clause may be broader, it must have some limits. The language of Chief Justice Stone suggests such a limitation.

We are concerned here with the separation of powers between national and state government established by our Constitution. This concept of federalism has been carefully preserved throughout our history by the courts, not by exhorting the Congress on the one hand or the state legislatures on the other to restrain their actions so as not to trespass on the rights, responsibilities, and duties of the other.

I cannot agree that it is a political question for the state to importune the Congress not to raise the salaries of

state employees, thus forcing the state legislature to tax its people to pay those employees. This is a direct transgression on the concept of federalism, which must be determined by the courts. The case before us is a perfect example of the wisdom of Constitutional rather than Congressional federalism. The amendment, through which the states are subjected to the Fair Labor Standards Act, was enacted without notice to the states so that they might be heard and without any thought being given to the effect of the Act on them. Surely the statement of one Congressman, even in the committee of the whole, did not alert the states, or constitute a Congressional finding, or give this Act a purpose as applied to the states as the majority would wish. [Note 10, Judge Winter's opinion.]

This case then brings into confrontation the powers of Congress under the Commerce Clause with the concept of dual sovereignty or federalism as embodied in our Constitution, which is articulated in the Tenth Amendment.

The effect of this Act must be measured against the Constitution precisely and its impact cannot be softened by what regulation a department of the national government might promulgate in its application.

What then is its effect on the state government?

By this Act Congress is forcing under threat of civil liability and criminal penalties, the state legislature or the responsible political subdivision of the state

1. to increase taxes (an impossibility in some of the political subdivisions without a state constitutional amendment); or

2. to curtail the extent and calibre of services in the public hospitals and educational and related institutions of the state; or

3. to reduce indispensable services in other governmental activities to meet the budgets of those activities favored by the United States Congress; or

4. to refrain from entering new fields of governmental activity necessitated by changing social conditions.

The allocation of the state's revenue among government activities is the most important function of state government, for it determines the extent and calibre of service which a state can supply. State governments must provide services out of current tax funds. The state government and its political subdivisions are particularly sensitive to the needs of the people and their ability to pay for the indispensable governmental functions that must be furnished.

The budget is, therefore, under constant study by both the executive and legislative branches of the state's government. Not only does the appropriation bill demand the highest consideration of the legislature while it is in session, but it also requires most of the attention of the executive and the interim legislative committees between sessions.*

There is only so much revenue available. The wise allocation of this money demands this constant up-to-the-minute knowledge of state and local governmental officials intimately concerned with the requirements and priorities to be allotted among the health, welfare, education, law enforcement, urban, pollution, and other demanding governmental functions, each of substantial importance. The states' Congressional delegations neither have the time, nor knowledge, nor is it their function to become involved in the vital details of state fiscal policy.

Perhaps all of the above can be expressed more graphically by a recent news story in the Baltimore Sun, which undoubtedly is repeated hundreds of times across the nation:

> "It is budget time again in Howard County. . . .
>
> "What particularly worries the commissioners is that the school budget [the largest expenditure of the

* For example, consider the reports of the Maryland General Assembly's Committee on Taxation and Fiscal Affairs from 1955 to date, the Maryland Legislative Council's Report for any year and countless other such documents reflecting the prodigious amount of time and effort put forth by state officials to supply governmental services. These documents may be found in the Archives of the Council of State Governments.

county government] has gone up on an average of 22 per cent each year while the taxable income goes up only 15 per cent and assessments only 9 per cent." The Evening Sun (Baltimore), April 6, 1967.

The impact of a mandatory allocation of state-collected revenues by Congress among the indispensable state governmental services is thus readily demonstrated. It amounts to the national government compelling state government action and controlling and operating the state government with little or no knowledge of the requirements of its citizens or the financial ability of those citizens to pay the bill.

The Congress, under the theory of this Act, can manipulate state governments by increasing the state functions to come under the "enterprise" concept or removing exemptions for classes of state employees at will without notice to the state, and all at the expense of the state. This Act is thus an intrusion of first magnitude into the functioning of state government now, is potentially without limit, and carries with it the formula for the destruction of the concept of federalism.

Congress has heretofore carefully avoided interjecting the national power into state or local governmental functions. Although grants-in-aid and matching funds might have that effect, these have a contractual basis — a far cry from mandatory direction. This Congressional reluctance in and of itself indicates a recognition of the Constitutional principle of federalism.

The careful nurturing of the concept of federalism has come to fruition since World War II in the increasing initiative of the states in meeting new problems brought about by the great social changes in our nation. The momentous "Metropolitan Problem" has caused the creation of new forms of local government in many of the affected areas. The wisdom of local administration has been clearly demonstrated. We are seeing many more govenmental activities being undertaken by the federal and state governments on a recognized partnership basis

directed at solving our internal problems. In light of the above examples of voluntary movement toward national and state partnership, rather than compulsion, it would indeed be tragic at this point in history to expand and broaden the power of the federal government over the state governments in the exercise of their necessary governmental functions under the guise of the "Commerce Clause" to a point never heretofore reached by any decision. To substitute now the delayed and ponderous action of a remote central government would atrophy and stifle this progress.

Alexis de Tocqueville in his *Democracy in America* said it in this manner:

> ". . . I cannot conceive that a nation can live and prosper without a powerful centralization of government. But I am of the opinion that a centralized administration is fit only to enervate the nations in which it exists, by incessantly diminishing their local spirit. Although such an administration can bring together at a given moment, on a given point, all the disposable resources of a people, it injures the renewal of those resources. It may insure a victory in the hour of strife, but it gradually relaxes the sinews of strength. It may help admirably the transient greatness of a man, but not the durable prosperity of a nation." Vol. I, pp. 86-87 (Bradley ed., New York, 1946).

Thus, the limitation upon a power, which has been delegated to the federal government — including the power to regulate commerce among the states — and which deals with the internal affairs of this nation, is reached when Congress exercises that power so as to interfere unduly in some manner with the state's performance of an indispensable governmental activity. The Act as applied to employees of public schools, hospitals, and related institutions is unconstitutional because it is an undue infringement upon the performance of an indispensable and fundamental governmental function (its taxing and budgetary function) of the state, which the Constitution recognizes as sovereign.

The proof of the wisdom of the federal concept is implicit in the name of our government — the "United States". It cannot be said more succinctly.

JUDGMENT

(Filed June 26, 1967)

This cause having come on for final argument and the parties having agreed to present this case for final decision on a stipulated record; and the plaintiffs in their complaints having prayed for a declaratory judgment and a preliminary and permanent injunction; and the court having received argument and briefs from the parties; now therefore, this 26th day of June, 1967, it is

ORDERED, ADJUDGED AND DECREED:

Plaintiffs' motion for summary judgment and prayers for interlocutory and permanent injunctive relief are denied for the reasons set forth in the opinions of the Court.

Accordingly, this action is dismissed without costs to either party.

/s/ HARRISON L. WINTER,
Circuit Judge.

/s/ ROSZEL C. THOMSEN,
District Judge.

.....
District Judge.

APPENDIX B

TEXT OF FAIR LABOR STANDARDS ACT AS AMENDED IN 1966

Act of June 25, 1938, as amended by Fair Labor Standards Amendments of 1949 (Public Law 393, 81st Congress), effective January 25, 1950, and by Fair Labor Standards Amendments of 1955 (Public Law 381, Chapter 867, 84th Congress, 1st Session), approved August 12, 1955, further amended by H.R. 7458 (Public Law 85231, 85th Congress, 1st Session), approved August 30, 1957, effective November 28, 1957; amended by P.L. 85-750, approved August 25, 1958; by the Judicial Review Act, P.L. 85-791, approved August 28, 1958; by the Fair Labor Standards Amendments of 1961, P.L. 87-30, approved May 5, 1961, effective September 3, 1961; by the Equal Pay Act of 1963, approved June 10, 1963, effective June 11, 1964, and by P.L. 89-601, approved September 23, 1966, effective February 1, 1967. Annotations in brackets show changes made by amendments.

Section

1. Title.
2. Finding and declaration of policy.
3. Definitions.
4. Administrator.
5. Industry committees for Puerto Rico and the Virgin Islands.
6. Minimum wages.
7. Maximum hours.
8. Wage orders.
9. Attendance of witnesses.
10. Court review.
11. Investigations, inspections, and records.
12. Child labor provisions.
13. Exemptions.
14. Learners, apprentices, and handicapped workers.
15. Prohibited acts.

16. Penalties.
17. Injunction proceedings.
18. Relations to other laws.
19. Separability of provisions.

AN ACT

TO PROVIDE FOR THE ESTABLISHMENT OF FAIR LABOR STANDARDS IN EMPLOYMENT IN AND AFFECTING INTERSTATE COMMERCE, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. That this Act may be cited as the "Fair Labor Standards Act of 1938."

FINDINGS AND DECLARATION OF POLICY

Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

[Sec. 2 of P. L. 81-393, effective Jan. 25, 1950, added the words "and with foreign nations" in the fifth line of subsection (b) above.]

DEFINITIONS

Sec. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

[The concluding words "between any State and any place outside thereof" were substituted by Section 3(a) of P. L. 81-393, effective Jan. 25, 1950, for the original words "from any State to any place outside thereof."]

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence), or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Section 3(d) was amended by P. L. 89-601, effective Feb. 1, 1967, by inserting after "of a State" the phrase beginning "(except with respect" and ending "such sentence)".

(e) "Employee" includes any individual employed by an employer, except that such term shall not, for the purposes of section 3(u) include—

[e] (1) any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family, or

[e] (2) any individual who is employed by an employer engaged in agriculture if such individual (A) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been paid on a piece rate basis in the region of employment, (B) commutes daily from his permanent residence to the farm on which he is so employed, and (C) has been employed in agriculture less than thirteen weeks during the preceding calendar year.

[Section 3(e) was amended by P. L. 89-601, effective Feb. 1, 1967, to add the exceptions provided in paragraphs (1) and (2).]

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry, or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any

part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

[Section 3(b) of P.L. 81-393, effective Jan. 25, 1950, inserted, before the word "process" in the third line from the end of this subsection, the words "closely related." In addition, after the word "occupation" in the same line, it deleted the word "necessary" and substituted the words "directly essential." The last portion of the subsection had previously read: "or in any process or occupation necessary to the production thereof, in any State."]

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find

and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

[Section 3(c) of P. L. 81-393, effective Jan. 25, 1950, added the language in the last part of the parentheses which occurs in lines 5 to 16 in subsection (1) above. The language is: "or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being"]

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: Provided, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: Provided further, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers

similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that in the case of an employee who (either himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased under this sentence, the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount.

[Section 3(m) was amended to add the last two provisos by the Fair Labor Standards Amendments of 1961 approved May 5, 1961, effective Sept. 3, 1961. This section was further amended by P.L. 89-601, effective Feb. 1, 1967, by adding the sentence beginning "In determining the . . ." and ending "such lesser amounts."]

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: Provided, That the sale is recognized as a bona fide retail sale in the industry.

[Section 3(n) was added by Section 3(d) of P.L. 81-393; it was further amended to add the phrase "except as used in subsection (s)(1)" after the term "resale" by the Fair Labor Standards Amendments of 1961 approved May 5, 1961, effective September 3, 1961. This paragraph was further amended by P.L. 89-601, effective Feb. 1, 1967, by striking out the words "except as used in subsection (s) (1)," immediately following "Resale."]

(o) Hours Worked — In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

[Subsection (o) was added by Section 3(d) of P.L. 81-393, effective Jan. 25, 1950.]

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: Provided, That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or

service establishments. For purposes of this subsection, the activities performed by any person or persons—

(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), shall be deemed to be activities performed for a business purpose.

[Section 3(r) was amended by P.L. 89-601, effective Feb. 1, 1967, by adding at the end thereof the language beginning "For the purposes . . ." and ending ". . . for a business purpose."]

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose an-

nual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated;

(2) is engaged in laundering, cleaning, or repairing clothing or fabrics;

(3) is engaged in the business of construction or reconstruction, or both; or

(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

Any establishment which has as its only regular employee the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

[Section 3 was amended to add subsections (p), (q), (r), and (s) by the Fair Labor Standards Amendments of 1961 approved May 5, 1961, effective Sept. 3, 1961. Section 3(s) was amended by P.L. 89-601, effective Feb. 1, 1967, to substitute virtually entirely new language. Prior to the amendment, Section 3(s) read as follows:

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:

"(1) any such enterprise which has one or more retail or service establishments if the annual gross volume of sales of such enterprise is not less than $1,000,000, exclusive of excise taxes at the retail level which are separately stated and if such enterprise purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more;

"(2) any such enterprise which is engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier if the annual gross volume of sales of such enterprise is not less than $1,000,000, exclusive of excise taxes at the retail level which are separately stated;

"(3) any establishment of any such enterprise except establishments and enterprises referred to in other paragraphs of this subsection, which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000;

"(4) any such enterprise which is engaged in the business of construction or reconstruction, or both, if the annual gross volume from the business of such enterprise is not less than $350,000;

"(5) any gasoline service establishment if the annual gross volume of sales of such establishment is not less than $250,000, exclusive of excises taxes at the retail level which are separately stated:

"Provided, That an establishment shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce, or a part of an enterprise engaged in commerce or in the production of goods for commerce, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection, if the only employees of such establishment are the owner

thereof or persons standing in the relationship of parent, spouse, or child of such owner."]

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips.

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

[Section 3 was amended by P.L. 89-601, effective Feb. 1, 1967, to add subsections (t), (u), (v), and (w).]

ADMINISTRATOR

Sec. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $26,000 a year.

[Section 4 of P. L. 81-393 effective Jan. 25, 1950, substituted "$15,000" in the last line of the subsection above for "$10,000" in the original statute. The salary then was raised to $20,000 and in 1964 to $26,000 by P. L. 88-426.]

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator

may establish and utilize such regional, local or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney-General. In the appointment, selection, classification and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his daily authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the minimum wages established by this Act, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the cost of living and in productivity and the level of wages in manufacturing, the ability of employers to absorb wage increases, and such other factors as he may deem pertinent.

[Sec. 4(d) was amended by Sec. 2 of the Fair Labor Standards Amendments of 1955, effective August 12, 1955, to add the last two sentences.]

Investigations of Effects on Employment of Foreign Competition

(e) Whenever the Secretary has reason to believe that in any industry under this Act the competition of foreign producers in United States markets or in markets abroad, or both, has resulted, or is likely to result, in increased

unemployment in the United States, he shall undertake an investigation to gain full information with respect to the matter. If he determines such increased unemployment has in fact resulted, or is in fact likely to result, from such competition, he shall make a full and complete report of his findings and determinations to the President and to the Congress: Provided, That he may also include in such report information on the increased employment resulting from additional exports in any industry under this Act as he may determine to be pertinent to such report.

[Sec. 4 was amended to add subsection (e) by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective Sept. 3, 1961.]

SPECIAL INDUSTRY COMMITTEES FOR PUERTO RICO AND VIRGIN ISLANDS

Sec. 5. (a) The Administrator shall as soon as practicable appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to employees in Puerto Rico or the Virgin Islands, engaged in commerce or in the production of goods for commerce, or employed in any enterprise engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce or employed in any enterprise engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees shall be subject to the provisions of section 8.

[Section 5(a) was amended by the Fair Labor Standards Amendments of 1961 approved May 5, 1961, effec-

tive September 3, 1961, to insert after the words "production of goods for commerce" wherever they appear the phrase "or employed in any enterprise engaged in commerce or in the production of goods for commerce."]

[Sec. 5(a) was amended by Sec. 5(a) of the Fair Labor Standards Amendments of 1955, effective August 12, 1955, by striking out "and the administrator" in the last sentence. The sentence previously read: "In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committee" and the Administrator shall be subject to the provisions of section 8.]

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

[This subsection was reenacted by Section 5 of P: L. 81393 effective Jan. 25, 1950.]

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall

by rules and regulations prescribe the procedure to be followed by the committee.

[This subsection was reenacted by Section 5 of P. L. 81-393 effective Jan. 25, 1950.]

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

[Section 5 of P. L. 81-393 effective Jan. 25, 1950, reenacted the above subsection. It also deleted a subsection (e) which read as follows:

"(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommended the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifi-

cations, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

"No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands."]

MINIMUM WAGES

Sec. 6. (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $1.40 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966 and not less than $1.60 an hour thereafter, except as otherwise provided in this section;

[Sections 6(a) and 6(a)(1) were amended by P. L. 89-601, effective Feb. 1, 1967, by deleting all existing material and inserting in its place the new material beginning "Every employer shall . . ." and ending ". . . provided in this section;" Sec. 6(a)(1) previously was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective Sept. 3, 1961, to raise the minimum from $1.00 an hour to $1.15 on Sept. 3, 1961, and to $1.25 in 1963." The $1-an-hour minimum was incorporated into the law by Sec. 3 of the Fair Labor Standards Amendments of 1955, approved Aug. 12, 1955, and made effective March 1,

1956. This minimum superseded an hourly minimum of 75 cents.

Previously, Sec. 6(a) of P. L. 81-393, effective Jan. 25, 1950, substituted "75 cents an hour" for the following four subparagraphs in the original statute.

"(1) during the first year from the effective date of this section, not less than 25 cents an hour.

"(2) during the next six years from such date, not less than 30 cents an hour.

"(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

"(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8."]

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power, without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the methods and procedure for ascer-

taining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.

[The above subparagraph, unchanged from the original law, was renumbered as "(2)" by Section 6(b) of P. L. 81-393, effective Jan. 25, 1950.]

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b), not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are applicable to the special industry committees provided for Puerto Rico and the Virgin Islands by this Act as amended from time to time. Each such committee shall have the same powers and duties and shall apply the same standards with respect to the application of the provisions of this Act to employees employed in American Samoa as pertain to special industry committees established under section 5 with respect to employees employed in Puerto Rico or the Virgin Islands. The minimum wage rate thus established shall not exceed the rates prescribed in paragraph (1) of this subsection;

(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(5) if such employee is employed in agriculture, not less than $1 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966, not less than $1.15 an hour during the second year from such date, and not less than $1.30 an hour thereafter.

[Sec. 6(a)(3) was added by amendment approved August 8, 1956 (Public Law 1023, Ch. 1035, S. 3956. The subsection was further amended by the Fair Labor Standards Amendments of 1961 to substitute the first sentence for the following: "if such employee is employed in American Samoa, at less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are now applicable to the special industry committees provided for Puerto Rico and the Virgin Islands by this Act." This section was further amended by P. L. 89-601, effective Feb. 1, 1967, by changing the period at the end of the preceding paragraph to a semicolon and adding paragraph (5).]

(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a) (5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments make to this Act by the Fair Labor Standards Amendments of 1966, wages at the following rates:

(1) not less than $1 an hour during the first year from the effective date of such amendments,

(2) not less than $1.15 an hour during the second year from such date,

(3) not less than $1.30 an hour during the third year from such date,

(4) not less than $1.45 an hour during the fourth year from such date, and

(5) not less than $1.60 an hour thereafter.

[Section 6(b) was amended by P. L. 89-601, effective Feb. 1, 1967, by deleting all existing material and inserting in its place the new material beginning "Every employer shall . . ." and ending with subsection 6(b)(5). Prior to the amendment, Section 6(b) read as follows:

"(b) Every employer shall pay to each of his employees who in any workweek (i) is employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined in section 3(s)(1), (2), or (4) or by an establishment described in section 3(s)(3) or (5), and who, except for the enactment of the Fair Labor Standards Amendments of 1961, would not be within the purview of this section, or (ii) is brought within the purview of this section by the amendments made to section 13(a) of this Act by the Fair Labor Standards Amendments of 1961, wages at rates—

"(1) not less than $1 an hour during the first three years from the effective date of such amendments; not less than $1.15 an hour during the fourth year from such date; and not less than the rate effective under paragraph (1) of subsection (a) thereafter;

"(2) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement)."]

(c)(1) The rate or rates provided by subsections (a) and (b) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5.

(2) In the case of any such employee who is covered by such a wage order and to whom the rate or rates prescribed by subsection (a) would otherwise apply, the following rates shall apply:

(A) The rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1966, increased by 12 per centum, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C). Such rate or rates shall become effective sixty days after the effective date of the Fair Labor Standards Amendments of 1966 or one year from the effective date of the most recent wage order applicable to such employee theretofore issued by the Secretary pursuant to the recommendations of a special industry committee appointed under section 5, whichever is later.

(B) Beginning one year after the applicable effective date under paragraph (A), not less than the rate or rates prescribed by paragraph (A), increased by an amount equal to 16 per centum of the rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1966, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the secretary pursuant to the recommendations of a review committee appointed under paragraph (C).

(C) Any employer, or group of employers, employing a majority of the employees in an industry in Puerto Rico or the Virgin Islands, may apply to the Secretary in writing for the appointment of a review committee to recommend

the minimum rate or rates to be paid such employees in lieu of the rate or rates provided by paragraph (A) or (B). Any such application with respect to any rate or rates provided for under paragraph (A) shall be filed within sixty days following the enactment of the Fair Labor Standards Amendments of 1966 and any such application with respect to any rate or rates provided for under paragraph (B) shall be filed not more than one hundred and twenty days and not less than sixty days prior to the effective date of the applicable rate or rates under paragraph (B). The Secretary shall promptly consider such application and may appoint a review committee if he has reasonable cause to believe, on the basis of financial and other information contained in the application, that compliance with any applicable rate or rates prescribed by paragraph (A) or (B) will substantially curtail employment in such industry. The Secretary's decision upon any such application shall be final. Any wage order issued pursuant to the recommendations of a review committee appointed under this paragraph shall take effect on the applicable effective date provided in paragraph (A) or (B).

(D) In the event a wage order has not been issued pursuant to the recommendation of a review committee prior to the applicable effective date under paragraph (A) or (B), the applicable percentage increase provided by any such paragraph shall take effect on the effective date prescribed therein, except with respect to the employees of an employer who filed an application under paragraph (C) and who files with the Secretary an undertaking with a surety or sureties satisfactory to the Secretary for payment to his employees of an amount sufficient to compensate such employees for the difference between the wages they actually receive and the wages to which they are entitled under this subsection. The Secretary shall be empowered to enforce such undertaking and any sums recovered by him shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sum not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts.

(3) In the case of any such employee to whom subsection (a)(5) or subsection (b) would otherwise apply, the Secretary shall within sixty days, after the effective date of the Fair Labor Standards Amendments of 1966 appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates in accordance with the standards prescribed by section 8, but not in excess of the applicable rate provided by subsection (a)(5) or subsection (b), to be applicable to such employee in lieu of the rate or rates prescribed by subsection (a)(5) or subsection (b), as the case may be. The rate or rates recommended by the special industry committee shall be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1966.

(4) The provisions of section 5 and section 8, relating to special industry committees, shall be applicable to review committees appointed under this subsection. The appointment of a review committee shall be in addition to and not in lieu of any special industry committee required to be appointed pursuant to the provisions of subsection (a) of section 8, except that no special industry committee shall hold any hearing within one year after a minimum wage rate or rates for such industry shall have been recommended to the Secretary by a review committee to be paid in lieu of the rate or rates provided for under paragraph (A) or (B). The minimum wage rate or rates prescribed by this subsection shall be in effect only for so long as and insofar as such minimum wage rate or rates have not been superseded by a wage order fixing a higher minimum wage rate or rates (but not in excess of the applicable rate prescribed in subsection (a) or subsection (b)) hereafter issued by the Secretary pursuant to the recommendation of a special industry committee.

[Section 6(c) was amended by P.L. 81-609, effective Feb. 1, 1967, by deleting all existing material and inserting 6(c) (1) through (4)] in its place. Prior to the amendment it read as follows:

"(c) The rate or rates provided by subsections (a) and (b) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5: Provided, That (1) the following rates shall apply to any such employee to whom the rate or rates prescribed by subsection (a) would otherwise apply:

"(A) The rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1961, increased by 15 per centum, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C). Such rate, or rates shall become effective sixty days after the effective date of the Fair Labor Standards Amendments of 1961 or one year from the effective date of the most recent wage order applicable to such employee theretofore issued by the Secretary pursuant to the recommendations of a special industry committee appointed under section 5, whichever is later.

"(B) Beginning two years after the applicable effective date under paragraph (A), not less than the rate or rates prescribed by paragraph (A), increased by an amount equal to 10 per centum of the rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1961, unless such rate or rates are superseded by the rate or rate prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C).

"(C) Any employer, or group of employers, employing a majority of the employees in an industry in

Puerto Rico or the Virgin Islands, may apply to the Secretary in writing for the appointment of a review committee to recommend the minimum rate or rates to be paid such employees in lieu of the rate or rates provided by paragraph (A) or (B). Any such application with respect to any rate or rates provided for under paragraph (A) shall be filed within sixty days following the enactment of the Fair Labor Standards Amendments of 1961 and any such application with respect to any rate or rates provided for under paragraph (B) shall be filed not more than one hundred and twenty days and not less than sixty days prior to the effective date of the applicable rate or rates under paragraph (B). The Secretary shall promptly consider such application and may appoint a review committee if he has reasonable cause to believe, on the basis of financial and other information contained in the application, the compliance with any applicable rate or rates prescribed by pargarph (A) or (B) will substantially curtail employment in such industry. The Secretary's decision upon any such application shall be final. Any wage order issued pursuant to the recommendations of a review committee appointed under this paragraph shall take effect on the applicable effective date provided in paragraph (A) or (B).

"(D) In the event a wage order has not been issued pursuant to the recommendation of a review committee prior to the applicable effective date under paragraph (A) or (B), the applicable percentage increase provided by any such paragraph shall take effect on the effective date prescribed therein, except with respect to the employees of an employer who filed an application under paragraph (C) and who files with the Secretary an undertaking with a surety or sureties satisfactory to the Secretary for payment to his employees of an amount sufficient to compensate such employees for the difference between the wages they actually receive and the wages to which they are entitled under this subsection. The Secretary shall be empowered to enforce such undertaking and any sums

recovered by him shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sum not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts.

"(2) In the case of any such employee to whom subsection (b) would otherwise apply, the Secretary shall within sixty days after the enactment of the Fair Labor Standards Amendments of 1961 appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates in accordance with the standards prescribed by section 8, not in excess of the applicable rate provided by subsection (b), to be applicable to such employee in lieu of the rate or rates prescribed by subsection (b). The rate or rates recommended by the special industry committee shall be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1961.

"(3) The provisions of section 5 and section 8, relating to special industry committees, shall be applicable to review committees appointed under this subsection. The appointment of a review committee shall be in addition to and not in lieu of any special industry committee required to be appointed pursuant to the provisions of subsection (a) of section 8 except that no special industry committee shall hold any hearing within one year after a minimum wage rate or rates for such industry shall have been recommended to the Secretary by a review committee to be paid in lieu of the rate or rates provided for under paragraph (A) or (B). The minimum wage rate or rates prescribed by this subsection shall be in effect only for so long as and insofar as such minimum wage rate or rates have not been superseded by a wage order fixing a higher minimum wage rate or rates (but not in ex-

cess of the applicable rate prescribed in subsection (a) or subsection (b)) hereafter issued by the Secretary pursuant to the recommendation of a special industry committee.".

[Section 6(c) was amended to read as above by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961. The section previously stated:

> "(c) The provisions of paragraph (1) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and in so far as such employee is covered by a wage order heretofore or hereafter issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5: Provided, That the wage order in effect prior to the effective date of this Act for any industry in Puerto Rico or the Virgin Islands shall apply to every employee in such industry covered by subsection (a) of this section until superseded by a wage order hereafter issued pursuant to the recommendations of a special industry committee appointed pursuant to section 5."]

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying

a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

(4) As used in this subsection, the term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

[Section 6(d) was added by the Equal Pay Act of 1963, approved June 10, 1963, effective June 11, 1964. Section 4 of this Act reads as follows:

> "Sec. 4. The amendments made by this Act shall take effect upon the expiration of one year from the date of its enactment: Provided, that in the case of employees covered by a bona fide collective bargaining agreement in effect at least thirty days prior to the date of enactment of this Act, entered into by a labor organization (as defined in section 6(d)(4) of the Fair Labor Standards Act of 1938, as amended), the amendments made by this Act shall take effect upon the termination of such collective bargaining agreement or upon the expiration of two years from the date of enactment of this Act, whichever shall first occur."]

(e)(1) Notwithstanding the provisions of section 13 of this Act (except subsections (a)(1) and (f) thereof),

every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 (41 U.S.C. 351-357) or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of section 13 of this Act (except subsections (a)(1) and (f) thereof) and the provisions of the Service Contract Act of 1965, every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b), except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

[Section 6 was amended by P. L. 89-601 effective Feb. 1, 1967, to add subsection (e).]

MAXIMUM HOURS

Sec. 7 (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the produc-

tion of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[Section 7(a) was amended by P.L. 81-609, effective Feb. 1, 1967, by deleting all existing material and inserting 7(a)(1) through 7(a)(2)(C) in its place. Prior to the amendment it read as follows:

"Sec. 7. (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; and

"(2) No employer shall employ any of his employees who in any workweek (i) is employed in an enterprise engaged in commerce or in the production of goods for commerce, as defined in section 3(s) (1) or (4), or by an establishment described in section 3(s) (3), and who, except for the enactment of the Fair Labor Standards Amendments of 1961, would not be

within the purview of this subsection, or (ii) is brought within the purview of this subsection by the amendments made to section 13 of this Act by the Fair Labor Standards Amendments of 1961—

"(A) for a workweek longer than forty-four hours during the third year from the effective date of the Fair Labor Standards Amendments of 1961,

"(B) for a workweek longer than forty-two hours during the fourth year from such date,

"(C) for a workweek longer than forty hours after the expiration of the fourth year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[Section 7(a) previously was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, by designating the subsection "(a)(1)", by inserting after the word "who" the words "in any workweek" and by striking out the period at the end and inserting a semicolon and the word "and" and by adding the paragraph (2) above. Previously the subsection read as follows:

> "Sec. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."]

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

[Section 7(b) was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, by striking out "in excess of forty hours in the workweek" in paragraph (2) and inserting the phrase "in excess of the maximum workweek applicable to such employee under subsection (a)."]

[In the fifth line of subparagraph (1) of this subsection, Section 7 of P. L. 81-393, effective Jan. 25, 1950, substituted "one thousand and forty" for "one thousand." It also substituted new language in subparagraph (2). The latter subparagraph in the original Act read as follows:

"(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employees shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks."]

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale.

and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 6,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

[Section 7(b)(3) was amended by P.L.89-601, effective Feb. 1, 1967, to delete the existing paragraph and replaces it with the new Section 7(b)(3). Prior to the amendment, the paragraph dealt with the exemption for seasonal industries, which was revised and incorporated in Section 7(c) below, and read as follows:

"(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

And if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed."

A paragraph similar to the present Section 7(b)(3) previously appeared in Section 13(b)(10).]

(c) For a period or periods of not more than ten workweeks in the aggregate in any calendar year, or fourteen workweeks in the aggregate in the case of an employer who does not qualify for the exemption in subsection (d) of this section, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection if such employee (1) is employed by such employer in an industry found by the Secretary to be of a seasonal nature, and (2) receives compensation for employment by such employer in excess of ten hours in any workday, or for employment by such employer in excess of fifty hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(d) For a period or periods of not more than ten workweeks in the aggregate in any calendar year, or fourteen workweeks in the aggregate in the case of an employer who does not qualify for the exemption in subsection (c) of this section, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee—

(1) is employed by such employer in an enterprise which is in an industry found by the Secretary—

(A) to be characterized by marked annually recurring seasonal peaks of operation at the places of first marketing or first processing of agricultural or horticultural commodities from farms if such industry is engaged in the handling, packing, preparing, storing, first processing, or canning of any perishable agricultural or horticultural commodities in their raw or natural state, or

(B) to be of a seasonal nature and engaged in the handling, packing, storing, preparing, first processing, or canning of any perishable agricultural or horticultural commodities in their raw or natural state, and

(2) receives compensation for employment by such employer, in excess of ten hours in any workday, or for employment in excess of forty-eight hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

[Section 7(c) was amended and Section 7(d) was added by P.L. 89-601, effective Feb. 1, 1967. The new paragraphs revise the seasonal-industry and first-processing exemptions previously provided by Sections 7(b)(3) and 7(c). Prior to the amendment, Section 7(c) read as follows:

"(c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugar-cane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonable fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period

or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged in."

The addition of Section 7(d) required a redesignation of Sections 7(e), (f), (g), and (h) below.]

(e) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

[e] (2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

[e] (3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust, or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard, among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the pay-

ments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

[e] (4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

[e] (5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

[Subparagraph 7(e)(5) was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, by striking out "forty in a workweek" and inserting the phrase "in excess of the maximum workweek applicable to such employee under subsection (a)."]

[e] (6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days; or

[e] (7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)), where such premium rate is not less than one and one-half times the rate established in

good faith by the contract or agreement for like work performed during such workday or workweek.

[Subsection (e), which was (d) before the 1966 amendments, was added by Section 7 of P. L. 81-393, effective Jan. 25, 1950. Subparagraphs (6) and (7) incorporate a portion of Section 1 of the Overtime Act (see annotation to Sec. 7(f) below).

[Subparagraph 7(e)(7) was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, by striking out "forty hours" and inserting the phrase "the maximum workweek applicable to such employee under subsection (a)."]

(f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

[Section 7 of P. L. 81-393, effective Jan. 25, 1950, enacted the above subsection to replace the prior Section 7(e), which had been added by Section 1 of the Overtime Act (P. L. 177, 81st Congress). The language superseded was as follows:

"(f) For the purpose of computing overtime compensation payable under this section to an employee

(1) who is paid for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day

of the workweek, at a premium rate not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days, or

(2) who, in pursuance of an applicable employment contract or collective bargaining agreement, is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek, the extra compensation provided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work."

The content of the former Section 7(f) is incorporated in subparagraph (6) and (7) of Section 7(e) and in Section 7(g).]

[Subsection 7(f), which was (e) before the 1966 amendments, was further amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, by (1) striking out "forty-hours" and inserting the phrase "the maximum workweek applicable to such employee under subsection (a)", (2) striking out "section 6(a)" and inserting "subsection (a) or (b) (whichever may be applicable)", and (3) striking out "forty in any" workweek and inserting "such maximum" workweek.]

(g) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the

amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

[Subsection 7(g), which was (f) before the 1966 amendments, was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, by striking out "forty hours" both times it appears and inserting the phrase "the maximum workweek applicable to such employee under such subsection—".]

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: Provided, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time; and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

[The above subsection was added by section 7 of P. L. 81-393, effective Jan. 25, 1950.]

(h) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

[This subsection, which was (g) before the 1966 amendments, was added by Section 7 of P. L. 81-393, effective Jan. 25, 1950. It incorporates part of Section 1 of the Overtime Act (see annotation to Sec. 7(f) above.]

(i) No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 6, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods of services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

[Section 7(i), which was (h) before the 1966 amendments, was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961.] Subsection (i) was amended by P.L. 81-609, effective Feb. 1, 1967, by adding at the end thereof the sentence beginning "In determining . . ." and ending ". . . or guarantee."]

[Subsection (d), (e), (f), (g), and (h) of Section 7 were redesignated as subsections (e), (f), (g), (h), and (i) respectively by P.L. 89-601, effective Feb. 1, 1967.]

(j) No employer engaged in the operation of a hospital shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at be-

tween the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

[Section 7(j) was added by P.L. 89-601 effective Feb. 1, 1967.]

WAGE ORDERS IN PUERTO RICO AND VIRGIN ISLANDS

Sec. 8. (a) The policy of this Act with respect to industries or enterprises in Puerto Rico and the Virgin Islands engaged in commerce or in the production of goods for commerce is to reach as rapidly as is economically feasible without substantially curtailing employment the objective of the minimum wage prescribed pursuant to paragraph (1) of section 6(a) in each such industry. The Administrator shall from time to time convene an industry committee or committees, appointed pursuant to section 5, and any such industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce in any such industry or classification therein. Minimum rates of wages established in accordance with this section which are not equal to the minimum wage rate prescribed in paragraph (1) of Section 6(a) shall be reviewed by such committee once during each biennial period, beginning with the biennial period commencing July 1, 1958, except that the Secretary, in his discretion, may order an additional review during any such biennial period.

[Sec. 8(a) was amended by Public Law 85-750, 85th Congress, H.R. 12967, approved August 25, 1958, to add the last sentence.

Section 8 of P. L. 81-393, effective Jan. 25, 1950, substituted the above form of this subsection, except for the last sentence, for subsection 8(a) of the original statute, which read as follows:

"(a) with a view to carrying out the policy of this Act by reaching as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classification therein.

The subsection was further amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, by inserting after the word "industries" in the first sentence the words "or enterprises"; and by inserting after words "production of goods for commerce" in the second sentence the phrase "or in any enterprise engaged in commerce or in the production of goods for commerce".]

(b) Upon the convening of any such industry committee, the Administrator shall refer to it the question of the minimum wage rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, shall after due notice hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry and will not give any

industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

[Sec. 8(b) was amended by Sec. 5(b) of the Fair Labor Standards Amendments of 1955, effective August 12, 1955, by striking out the word "may" following the words "or any authorized subcommittee thereof" and inserting the words "shall after due notice."

Section 8 of P. L. 81-393, effective Jan. 25, 1950, added the following words at the end: "and will not give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands."]

(c) The industry committee shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of that prescribed pursuant to paragraph (2) of section 6(a)) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum-wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee shall consider among other relevant factors the following:

[Sec. 8(c) was amended by Sec. 5(c) of the Fair Labor Standards Amendments of 1955, effective August 12, 1955 to strike out "and the administrator" in the clause immediately above. It previously read: "but the industry committee and the administrator shall consider among other relevant factors the following:"]

(1) competitive conditions as affected by transportation, living and productions costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

[Section 8 of P.L. 81-393, effective Jan. 25, 1950, deleted the words "for any industry" which, in the original statute occurred in the first line of this subsection after the words "Committee". It also substitutes the words "not in excess of that prescribed pursuant to paragraph 2 of Section 6(a)," which appear in parenthesis in lines 7-9 of this subsection. The parenthetical words in the original statute "were not in excess of 40 cents an hour."]

(d) The industry committee shall file with the Secretary a report containing its findings of fact and recommendations with respect to the matters referred to it. Upon the filing of such report, the Secretary shall publish such recommendations in the Federal Register and shall provide by order that the recommendations contained in such report shall take effect upon the expiration of 15 days after the date of such publication.

[Sec. 8(d) was amended by Sec. 5(d) of the Fair Labor Standards Amendments of 1955, effective August 12, 1955, to substitute the above subsection (d) for that which previously read as follows:

"(d) the industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due

notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose) for further consideration and recommendations."

The above subsection was reenacted by Sec. 8 of P.L. 81-393, effective Jan. 25, 1950.]

(e) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.

[Sec. 8(e) was amended by Sec. 5(e) of the Fair Labor Standards Amendments of 1955, effective August 12, 1955, to strike out the last sentence which read:

"No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance."

Section 8 P.L. 81-393, effective Jan. 25, 1950, deleted the former subsection (e) and substituted the paragraph immediately above together with the deleted sentence. The former subsection 8(e) read as follows:

"(e) No order issued under this section with respect

to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry."]

(f) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

[The above Section 8(f), as renumbered by Section 8 of P.L. 81-393, effective Jan. 25, 1950, was subsection (g) of the original act.]

ATTENDANCE OF WITNESSES

Sec. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S.C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor, and the industry committees.

COURT REVIEW

Sec. 10. (a) Any person aggrieved by an order of the Secretary issued under section 8 may obtain a review of such order in the United States Court of Appeals for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within

60 days after the entry of such order a written petition praying that the order of the Secretary be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the court the record of the industry committee upon which the order complained of was entered, as provided in Section 2112 of Title 28, United States Code. Upon the filing of such petition such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by such industry committee when supported by substantial evidence shall be conclusive. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before such industry committee or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceedings before such industry committee, the court may order such additional evidence to be taken before an industry committee and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. Such industry committee may modify the initial findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Section 1254 of title 28 of the United States Code.

[Sec. 10(a) was amended by Sec. 5(f) of the Fair Labor Standards Amendments of 1955, effective August 12, 1955, to substitute "Secretary" and "in-

dustry committee" for "Administrator." The section was further amended by the Judicial Review Act (P.L. 85-791), approved August 28, 1958, to revise the second and third sentence to read as above.]

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, RECORDS, AND HOMEWORK REGULATIONS

Sec. 11. (a) The Administrator or his designated representatives, may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State Labor laws, the Administrator and the Secretary of Labor may, for the purpose of carrying out their respective functions and

duties under this Act, utilize the service of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder

(d) The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act, and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.

[This subsection was added by Section 9 of P.L. 81-393, effective Jan. 25, 1950.]

CHILD LABOR PROVISIONS

Sec. 12. (a) No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: Provided, That any such shipment or delivery for shipment or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed

prohibited by this subsection: And provided further, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

[Section 10(a) of P.L. 81-393, effective Jan. 25, 1950, deleted the following words from the beginning of the above subsection: "After the expiration of 120 days from the date of the enactment of this Act." It added also the first proviso beginning at line 9 and ending at line 20 ("That any such shipment * * * prohibited by this subsection, and provided further").]

(b) The Secretary of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11(a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawfull by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

(c) No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.

[This subsection was added by Section 10(b) of P.L. 81-393, effective Jan. 25, 1950. It was further amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961 to add this phrase at the end of the sentence; "or in any enterprise engaged in commerce or in the production of goods for commerce."]

EXEMPTIONS

Sec. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act, except that an employee of a retail or service establishment shall not be excluded from the definition of employee in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

[Section 13(a)(1) in the original statute declared:

"(a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or".]

[Section 13(a)(1) was amended by P.L. 89-601, effective Feb. 1, 1967, to add "(including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary school)".]

[a] (2) any employee employed by any retail or service establishment (except an establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school described in section 3(s)(4)), if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, and such establishment is not in an enterprise described in section

3(s) or such establishment has an annual dollar volume of sales which is less than $250,000 (exclusive of excise taxes at the retail level which are separately stated):

[Section 13(a)(2) was amended by P.L. 89-601, effective Feb. 1, 1967, by deleting the first five paragraphs and inserting a new paragraph. Prior to the amendments, the provisions read as follows:]

"[a](2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, if such establishment—

"(i) is not in an enterprise described in Section 3(s), or

"(ii) is in such an enterprise and is a hotel, motel, restaurant, or motion picture theatre; or in an amusement or recreational establishment that operates on a seasonal basis, or

"(iii) is in such an enterprise and is a hospital, or an institution which is primarily engaged in the care of the sick, the aged, the mentally ill or defective, residing on the premises of such institution, or a school for physical or mentally handicapped or gifted children, or

(iv) is in such an enterprise and has an annual dollar volume of sales (exclusive of excise taxes at the retail level which are separately stated) which is less than $250,000."

[Section 13(a)(9) below provides an exemption similar to that provided in the deleted paragraph (ii).]

A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or

[a] (3) any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such years; or

[Section 13(a)(3), which provided an exemption for laundries and dry cleaning establishments, was repealed by P.L. 89-601, effective Feb. 1, 1967, and the new paragraph dealing with amusement or recreational establishments inserted in its place. The laundry and dry cleaning exemption was incorporated in Section 13(a)(2) above. Prior to the amendments, Section 13(a)(3) read as follows:

[a] (3) any employee employed by any establishment engaged in laundering, cleaning or repairing clothing or fabrics, more than 50 per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located: Provided, That 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transportation, or communication business; or"

[a] (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: Provided, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; or

[Subparagraphs (2), (3), and (4), as they read prior to the 1961 and 1966 amendments, were inserted by Section 11 P. L. 81-393, effective Jan. 25, 1950, in place of the former subparagraph (2), which read as follows:

"(2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."]

[a] (5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee: or

[Section 13(a)(5) was amended to read as above by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961. The section previously stated:

"(a)(5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing (other than canning), marketing, freezing, curing, storing, or distributing the above products or by-products thereof; or"

Section 11 of P.L. 81-393, effective Jan. 25, 1950, added "(other than canning)" after the word "processing" in the above text and deleted the word "canning" which, in the original statute, occurred after the word "freezing."]

[a] (6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child,

or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

[Section 13(a)(6) was amended by P.L. 89-601, effective Feb. 1, 1967, by deleting the existing paragraph and substituting the paragraph above. Prior to the amendments, Section 13(a)(6) read as follows:

> "[a](6) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a share-crop basis, and which are used exclusively for supply and storing of water for agricultural purposes; or"

Section 11 of 81-393, effective Jan. 25, 1950, added in the above paragraph, these words in lines 2 to 8: "or in connection with * * * agricultural purposes."

See Section 13(b)(12) below for a new overtime exemption for employees of non-profit irrigation companies.]

[a] (7) any employee to the extent that such employee is exempted by regulations, orders, or certificates of the Secretary issued under section 14; or

[Section 13(a)(7) was amended to substitute "the Secretary" for "the Administrator" by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961. This section was further amended by P. L. 89-601, effective Feb. 1, 1967, by changing "or orders" to "orders, or certificates".]

[a] (8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county. where published or counties contiguous thereto; or

[Section 13(8)(a) was amended by P.L. 89-601, effective Feb. 1, 1967, by substituting "where published" for "where printed and published".]

[a] (9) any employee employed by an establishment which is a motion picture theatre; or

[Section 13(a)(9), which provided an exemption for employees of local transit systems, was deleted by P.L. 89-601, effective Feb. 1, 1967, and replaced by the paragraph above providing an exemption for employees of motion picture theaters. A similar exemption previously was provided by Section 13(a)(2)(ii). Prior to the amendments, Section 13(a)(9) read as follows:

"[a](9) any employee of a street, suburban, or interurban electric railway, or local trolley or motorbus carrier, not in an enterprise described in section 3(s)(2); or"

[Section 13(a)(9) previously was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, to delete the phrase "not included in other exemptions contained in this section"; and to substitute the phrase "not in an enterprise described in section 3(s)(2)."]

[Section 13(a)(10) was deleted and the subsequent paragraphs were renumbered by P.L. 89-601, effective Feb. 1, 1967. Prior to the amendments, Section 13(a)(10) read as follows:

"[a] (10) any individual employed within the area of production (as defined by the Secretary), engaged in handling, packing, storing, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or"

[a] (10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

[Section 11, now (10), of P. L. 81-393, effective Jan. 25, 1950, substituted in the last two lines of this paragraph the words "not more than seven hundred and fifty stations" for the words "less than five hundred stations."

Section 13(a)(11), now (10) was further amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, to delete the phrase "in a public telephone exchange" following the word "employed" and to insert the phrase "by an independently owned public telephone company."]

[Section 13(a)(12) was deleted by P.L. 89-601, effective Feb. 1, 1967, and Section 13(a)(13) was renumbered Section 13(a)(11). Prior to the amendments, Section 13(a)(12) provided an exemption for "any employee of an employer engaged in the business of operating taxicabs." A new Section 13(b)(17) below restricts the exemption to the overtime provisions and to "drivers" of an employer engaged in the business of operating taxicabs.]

[a] (11) any employee or proprietor in a retail or service establishment which qualifies as an exempt retail or

service establishment under clause (2) of this subsection with respect to whom the provisions of sections 6 and 7 would not otherwise apply, engaged in handling telegraphic messages for the public under an agency or contract arrangement with a telegraph company where the telegraph message revenue of such agency does not exceed $500 a month; or

[Section 13(a)(13), now (11) was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, to insert the phrase "which qualifies as an exempt retail or service establishment under clause (2)" after the word "establishment." The paragraph was previously added by Section 11 of P. L. 81-393, effective Jan. 25, 1950.]

[a](12) any employee employed as a seaman on a vessel other than an American vessel; or

[Section 13(a)(14), now (12), was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, to insert the phrase "on a vessel other than an American vessel" after the word "seaman." The paragraph, numbered as subparagraph (3) in the original statute, was reenacted by Section 11 of P.L. 81-393, effective Jan. 25, 1950, with the above number.]

[a] (13) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.

[This paragraph was added by Section 11 of P.L. 81-393, effective Jan. 25, 1950. It was further amended by P. L. 89-601, effective Feb. 1, 1967, by changing the number of employees permitted for the exemption from "twelve" to "eight."]

[a] (14) any agricultural employee employed in the growing and harvesting of shade-grown tobacco who is engaged in the processing (including, but not limited to, drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and bailing) of such tobacco, prior to the stemming process, for use as cigar wrapper tobacco.

[Section 13(a)(21), now (14), was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961. It was amended by P.L. 89-601, effective Feb. 1, 1967, by changing the semicolon at the end to a period.]

[In addition to deleting Sections 13(a)(10) and (12), P.L. 89-601, effective Feb. 1, 1967, deleted Sections 13(a)(16) (17), (18), (19), (20), and (22), and Sections 13(a)(11), (13), (14), (15) and (21) were renumbered as Sections 13(a)(10), (11), (12), (13), and (14). Prior to the amendments, the deleted subsections (16), (17), (18), (19), (20), and (22) read as follows:

"[a](16) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with livestock auction operations at a wage rate not less than that prescribed by section 6(a)(1); or

[Section 13(a)(16) previously was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961; effective Sept. 3, 1961.]

"[a](17) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm:

Provided, That no more than five employees are employed in the establishment in such operations; or"

[Section 13(a)(17) previously was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective Sept. 3, 1961.]

"[a](18) any employee engaged in ginning of cotton for market, in any place of employment located in a country where cotton is grown in commercial quantities; or"

[Section 13(a)(18) previously was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective Sept. 3, 1961.]

[a](19) any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implement; or"

[Section 13(a)(19) previously was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective Sept. 3, 1961.]

"[a](20) any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs; or"

[Section 13(a)(20) previously was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective Sept. 3, 1961.]

"[a](22) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables."

[Section 13(a)(22) previously was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective Sept. 3, 1961.]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or

[b] (2) any employee of an employer subject to the provisions of part I of the Interstate Commerce Act; or

[b] (3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act, or

[The above paragraph, formerly subparagraph (4) of subsection (a) of Section 13, was reenacted unchanged, but numbered as shown. Section 11 of P. L. 81-393, effective Jan. 25, 1950.]

[b] (4) any employee employed in the canning, processing, marketing, freezing, curing, storing, packing for shipment, or distributing of any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproduct thereof; or

[Section 13(b)(4) was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961, to insert, the phrase "processing, marketing, freezing, curing, storing, packing for shipment, or distributing" following the word "canning". The paragraph was added by Section 11 of P.L. 81-393, effective Jan. 25, 1950.]

[b] (5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

[This paragraph was added by Section 11 of P.L. 81-393, effective Jan. 25, 1950.]

[b] (6) any employee employed as a seaman; or

[Section 13(b)(6) was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961.]

(7) any driver, operator, or conductor employed by an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency; or

[Section 13(b)(7) was amended by P.L. 89-601, effective Feb. 1, 1967, to limit the exemption as specified above. Prior to the amendments, the exemption applied to "any employee of a street, suburban, or interurban electric railway, or local trolley or motorbus carrier."]

(8) any employee employed by an establishment which is a hotel, motel, or restaurant; or any employee who (A) is employed by an establishment which is an institution (other than a hospital) primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises, and (B) receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

[Section 13(b)(8), which provided an exemption from the overtime requirements, for "any employee of a gasoline service station" was deleted by P.L. 89-601, effective Feb. 1, 1967, and was replaced by the above exemption. See Section 3(s)(1) above for the "enterprise" coverage test for gasoline stations. Also see Section 3(s)(4) above for coverage of hospitals and Section 13(a)(2) for exemption for retail or service establishments.]

[b] (9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the

major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Bureau of the Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

[Section 13(b)(9) was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961.]

[b] (10) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers; or

[Section 13(b)(10), which provided an overtime exemption for employees of certain distributors of petroleum, was deleted by P.L. 89-601, effective Feb. 1, 1967, and was replaced by the exemption provided above. Section 13(a)(19) previously provided a similar exemption from both the minimum-wage and overtime requirements for the employees described above. Prior to the amendments, Section 13(b)(10) read as follows:]

"[b](10) any employee of an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if (A) the annual gross volume of sales of such enterprise is not more than $1,000,000 exclusive of excise taxes, and (B) more than 75 per centum of such enterprise annual dollar volume of sales is made within the State in which such enterprise is located, and (C) not more than 25 per centum of

the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale; or who are engaged in the bulk distribution of such products for resale; or"

[The exemption for the bulk distribution of petroleum products was transferred to Section 7(b)(3).]

[b] (11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 7(a); or"

[Section 13(b)(11) was added by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective Sept. 3, 1961. This section was further amended by P.L. 89-601, effective Feb. 1, 1967, by changing the period at the end of paragraph (11) to a semicolon and inserting "or" and adding new paragraphs (12), (13), (14), (15), (16), (17), (18), and (19).]

[b](12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing or water for agricultural purposes; or

[Section 13(b)(12) is similar to language deleted from Section 13(a)(6), which provided an exemption from both the minimum-wage and overtime requirements. The changes were made by P.L. 89-601, effective Feb. 1, 1967.]

[b](13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employ-

ment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operation at a wage rate not less than that prescribed by section 6(a)(1); or

[Section 13(b)(13) is similar to the deleted Section 13(a)(16), which provided an exemption from both the minimum-wage and overtime requirements. The changes were made by P.L. 89-601, effective Feb. 1, 1967.]

[b](14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

[Section 13(b)(14) is the same as the deleted Section 13(a)(17), which provided an exemption from both the minimum-wage and overtime requirements. The changes were made by P.L. 89-601, effective Feb. 1, 1967.]

[b](15) any employee engaged in ginning of cotton for market, in any place of employment located in a county where cotton is grown in commercial quantities, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (other than refined sugar) or syrup; or

[Section 13(b)(15) is the same as to the deleted Section 13(a)(18), which provided an exemption from both the minimum-wage and overtime requirements. The changes were made by P.L. 89-601, effective Feb. 1, 1967.]

[b](16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

[Section 13(b)(16) is the same as the deleted Section 13(a)(22), which provided an exemption from both the minimum-wage and overtime requirements. The changes were made by P.L. 89-601, effective Feb. 1, 1967.]

[b](17) any driver employed by an employer engaged in the business of operating taxicabs; or

[Section 14(b)(17) replaced Section 13(a)(12), which provided an exemption from both the minimum-wage and overtime requirements for "*any employee* employed by an employer engaged in the business of operating taxicabs." The changes were made by P.L. 89-601, effective Feb. 1, 1967.]

[Section 13(b)(18) is the same, as the deleted Section 13(a)(20), which provided an exemption from both the minimum-wage and overtime requirements. The changes were made by P.L. 89-601, effective Feb. 1, 1967.]

[b](18) any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs; or

[Section 13(b)(18) is the same as the deleted Section 13(a) 20, which provided an exemption from both the minimum-wage and overtime requirements. The

changes were made by P.L. 89-601, effective Feb. 1, 1967.]

[b](19) any employee of a bowling establishment if such employee receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed.

[Section 13(b)(19) was added by P.L. 89-601, effective Feb. 1, 1967.]

(c)(1) Except as provided in paragraph (2), the provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed.

(c)(2) The provisions of section 12 relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(c)(3) The provisions of section 12 relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

[Section 13(c) was amended by P.L. 89-601, effective Feb. 1, 1967, by adding paragraphs (1), (2), and (3). Prior to the amendments, Section 13(c) read as follows:

"(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed or to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions"]

[The Section previously was amended by P.L. 81-393, effective Jan. 25, 1950, which made three changes in this paragraph. First, it substituted these words in lines 4-7, "outside of school hours for the school district where such employee is living while he is so employed," replacing the prior language, "while not legally required to attend school." Second, it added the words "or performer" after the word "actor" in the third line from the end. Third, it added the last six words, "or in radio or television productions."]

(d) The provisions of sections 6, 7, and 12 shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths.)

[Section 13(d) was amended by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 4, 1961, to insert the following at the end of the sentence: "or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths)." The subsection, as it read before the 1961 amendments, was added by section 11 of P.L. 81-393, effective Jan. 25, 1950.]

(e) The provisions of section 7 shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 6 (a) (3), except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 7 if he shall find, after a public hearing on the matter, and taking into account the

factors set forth in section 6 (a) (3), that economic conditions warrant such action.

[Sec. 13(e) was added by amendment approved August 8, 1956 (Public Law 1023, Ch. 1035, S. 3956.]

(f) The provisions of Sections 6, 7, 11, and 12 shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Alaska; Hawaii; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (Ch. 345, 67 Stat. 462); American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; Johnston Island; and the Canal Zone.

[Sec. 13(f) was added by amendment approved August 30, 1957 (Public Law 85231, H.R. 7458, effective November 29, 1957). [Section 13(f) was amended by P.L. 89-601, effective Feb. 1, 1967, by deleting "and the Canal Zone" and inserting in its place "Eniwetok Atoll; Kwajalein Atoll; Johnston Island; and the Canal Zone."]

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

Sec. 14. (a) The Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.

(b) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment of full-time students, regardless of age but in compliance

with applicable child labor laws, on a part-time basis in retail or service establishments (not to exceed twenty hours in any workweek) or on a part-time or full-time basis in such establishments during school vacations, under special certificates issued pursuant to regulations of the Secretary, at a wage rate not less than 85 per centum of the minimum wage applicable under section 6, except that the proportion of student hours of employment to total hours of employment of all employees in any establishment may not exceed (1) such proportion for the corresponding month of the twelve-month period preceding May 1, 1961, (2) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered by this Act for the first time on or after the effective date of the Fair Labor Standards Amendments of 1966, such proportion for the corresponding month of the twelve-month period immediately prior to such date, or (3) in the case of a retail or service establishment coming into existence after May 1, 1961, or a retail or service establishment for which records of student hours worked are not available, a proportion of student hours of employment to total hours of employment of all employees based on the practice during the twelve-month period preceding May 1, 1961, in (A) similar establishments of the same employer in the same general metropolitan area in which the new establishment is located, (B) similar establishments of the same employer in the same or nearby counties if the new establishment is not in a metropolitan area, or (C) other establishments of the same general character operating in the community or the nearest comparable community. Before the Secretary may issue a certificate under this subsection he must find that such employment will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under this subsection.

(c) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by certificate or order provide for the employment of full-time students, regardless of age but in compliance with

applicable child labor laws, on a part-time basis in agriculture (not to exceed twenty hours in any workweek) or on a part-time or a full-time basis in agriculture during school vacations, at a wage rate not less than 85 per centum of the minimum wage applicable under section 6. Before the Secretary may issue a certificate or order under this subsection he must find that such employment will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under this subsection.

(d)(1) Except as otherwise provided in paragraphs (2) and (3) of this subsection, the Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment under special certificates of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, at wages which are lower than the minimum wage applicable under section 6 of this Act but not less than 50 per centum of such wage and which are commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.

(2) The Secretary, pursuant to such regulations as he shall prescribe and upon certification of the State agency administering or supervising the administration of vocational rehabilitation services, may issue special certificates for the employment of—

(A) handicapped workers engaged in work which is incidental to training or evaluation programs, and

(B) multihandicapped individuals and other individuals whose earning capacity is so severely impaired that they are unable to engage in competitive employment,

at wages which are less than those required by this subsection and which are related to the worker's productivity.

(3) (A) The Secretary may by regulation or order provide for the employment of handicapped clients in

work activities centers under special certificates at wages which are less than the minimums applicable under section 6 of this Act or prescribed by paragraph (1) of this subsection and which constitute equitable compensation for such clients in work activities centers.

(B) For purposes of this section, the term 'work activities centers' shall mean centers planned and designed exclusively to provide therapeutic activities for handicapped clients whose physical or mental impairment is so severe as to make their productive capacity inconsequential.

[Section 14 was amended by P. L. 89-601, effective Feb. 1, 1967, to delete the existing language and substitute the above. Prior to the amendments Section 14 read as follows:

"Sec. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, of messengers employed primarily in delivering letters and messages, and of full-time students outside of their school hours in any retail or service establishment: Provided, That such employment is not of the type ordinarily given to a full-time employee, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates."

Clause (1) of section 14 previously was amended by the Fair Labor Standards Amendments of 1961,

approved May 5, 1961, effective Sept. 3, 1961, by striking out "and" after "apprentices" and inserting after "messages," the following "and of full-time students outside of their school hours in any retail or service establishment: Provided, That such employment is not of the type ordinarily given to a full-time employee."

Section 12 of P.L. 81-393, effective Jan. 25, 1950 substituted the word "primarily" for "exclusively" after the word "employed" in the seventh line of this section.]

PROHIBITED ACTS

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

[Section 13(a) of P.L. 81-393, effective Jan. 25, 1950, added the last 11 lines in this paragraph, namely: "and

except that such transportation * * * deemed unlawful."]

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11(c), or any regulation or order made or continued in effect under the provisions of section 11(d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

[Section 13 (b) of P.L. 81-393, effective Jan. 25, 1950, added the words in lines 3 and 4 of this paragraph which read: "or continued in effect under the provisions of section 11(d)."]

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

Sec. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person

shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection."

[Section 16(b) was amended to add the last sentence by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961.]

(e) The Administrator is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or section 7 of this Act, and the agreement of any employee to accept such payment shall upon pay-

ment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. When a written request is filed by any employee with the Administrator claiming unpaid minimum wages or unpaid overtime compensation under section 6 or section 7 of this Act, the Administrator may bring an action in any court of competent jurisdiction to recover the amount of such claim: Provided, That this authority to sue shall not be used by the Administrator in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Administrator if it does involve any issue of law not so finally settled. The consent of any employee to the bringing of any such action by the Administrator, unless such action is dismissed without prejudice on motion of the Administrator, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. Any sums thus recovered by the Administrator on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Administrator, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Administrator under this subsection for the purposes of the statutes of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

[This subsection (c) was added by Section 14 of P.L. 81-393, effective Jan. 25, 1950. This subsection

was further amended by P.L. 89-601, effective Feb. 1, 1967 by substituting "statutes" for "two-year Statute."]

(d) In any action or proceeding commenced prior to, on, or after the date of enactment of this subsection, no employer shall be subject to any liability or punishment under this Act or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in Section 13(f) is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in Section 6(a)(3) at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

[Sec. 16(d) was added by amendment approved August 8, 1956 (Public Law 1023, Ch. 1035, S. 3956). Subsections (1) and (2) were added by amendment approved August 30, 1957 (Public Law 85231, H.R. 7458), effective November 29, 1957.]

INJUNCTION PROCEEDINGS

Sec. 17. The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947)."

[Section 17 was amended to read as above by the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961. The section previously stated:

"Sec. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction for cause shown, to restrain violations of section 15: Provided, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action."

This section was rewritten by Section 15 of P.L. 81-393, effective Jan. 25, 1950. The prior text was as follows:

"'The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws" against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914, as amended (U. S. C., 1943 edition, title 28, sec. 381) to restrain violations of section 15."]

RELATION TO OTHER LAWS

Sec. 18. (a) No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act, and no provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the

applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

(b) Notwithstanding any other provision of this Act (other than section 13 (f)) or any other law, any employee—

(1) described in paragraph (7) of section 202 of the Classification Act of 1949 (5 U.S.C. 1082 (7)) whose compensation is required to be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates, and any Federal employee in the Canal Zone engaged in employment of the kind described in such paragraph (7), or

(2) described in section 7474 of title 10, United States Code, whose rates of wages are established to conform, as nearly as is consistent with the public interest, with those of private establishments in the immediate vicinity, or

(3) employed in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces.

shall have his basic compensation fixed or adjusted at a wage rate which is not less than the appropriate wage rate provided for in section 6(a)(1) of this Act (except that the wage rate provided for in section 6(b) shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation set at an hourly rate not less than the overtime rate provided for in section 7(a)(1) of this Act.

[Section 18 was amended by P.L. 89-601, effective Feb. 1, 1967, by inserting "(a)" immediately after "Sec. 18." and adding subsection "(b)" at the end thereof.]

Separability of Provisions

Sec. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid ,the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Miscellaneous and Effective Date of 1949 Amendments

[Section 16 of Fair Labor Standards Amendments of 1949 (P.L. 81-393, effective Jan. 25, 1950.]

[Effective Date of Amendments]

(a) The amendments made by this Act shall take effect upon the expiration of ninety days from the date of its enactment; except that the amendment made by section 4 shall take effect on the date of its enactment.

[Relation to Portal Act]

(b) Except as provided in section 3(o) and in the last sentence of section 16(c) of the Fair Labor Standards Act of 1938, as amended, no amendment made by this Act shall be construed as amending, modifying, or repealing any provision of the Portal-to-Portal Act of 1947.

[Effect on Administrative Rulings and Interpretations]

(c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administration or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

[Limitation on Employer Liability]

(d) No amendment made by this Act shall affect any penalty or liability with respect to any act or omission occurring prior to the effective date of this Act: but, after the expiration of two years from such effective date, no action shall be instituted under section 16(b) of the Fair Labor Standards Act of 1938, as amended, with respect to any liability accruing thereunder for any act or omission, occurring prior to the effective date of this Act.

[Incorporation of Sec. 2 of Overtime Act]

(e) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949, for such work was at least equal to the compensation which would have been payable for such work had section 7(d)(6) and (7) and section 7(g) of the Fair Labor Standards Act of 1938, as amended, been in effect at the time of such payment.

[Repeal of Overtime Act]

(f) Public Law 177, Eighty-first Congress, approved July 20, 1949, is hereby repealed as of the effective date of this Act.

STUDIES BY SECRETARY AND EFFECTIVE DATE OF 1961 AMENDMENTS

[Sections 13 and 14 of the Fair Labor Standards Amendments of 1961, approved May 5, 1961, effective September 3, 1961]

[Study Of Agricultural Handling And Processing Exemptions And Rates Of Pay In Hotels, Motels, Restaurants, And Other Food Service Enterprises]

Sec. 13. The Secretary of Labor shall study the complicated system of exemptions now available for the handling and processing of agricultural products under such Act and particularly sections 7(b)(3), 7(c), and 13(a)(10), and the complex problems involving rates of pay of employees in hotels, motels, restaurants, and other food service enterprises who are exempted from the provisions of this Act, and shall submit to the second session of the Eighty-seventh Congress at the time of his report under section 4(d) of such Act a special report containing the results of such study and information, data and recommendations for further legislation designed to simplify and remove the inequities in the application of such exemptions.

[Effective Date]

Sec.14. The amendments made by this Act shall take effect upon the expiration of one hundred and twenty days after the date of its enactment, except as otherwise provided in such amendments and except that the authority to promulgate necessary rules, regulations, or orders with regard to amendments made by this Act, under the Fair Labor Standards Act of 1938 and amendments thereto, including amendments made by this Act, may be exercised by the Secretary on and after the date of enactment of this Act.

FAIR LABOR STANDARDS AMENDMENTS OF 1966

TITLE VI—MISCELLANEOUS

(Note: The amendments made by Titles I through V of the Fair Labor Standards Amendments of 1966 are integrated into the text of the basic statute.)

STATUTE OF LIMITATIONS

(a) Section 16(c) of such Act is amended by striking out "two-year statute" and by inserting in lieu thereof "statutes".

(b) Section 6(a) of the Portal-to-Portal Act of 1947 (Public Law 49, Eightieth Congress) is amended by in-

serting before the semicolon at the end thereof the following: ", except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued".

Effective Date

Except as otherwise provided in this Act, the amendments made by this Act shall take effect on February 1, 1967. On and after the date of the enactment of this Act the Secretary is authorized to promulgate necessary rules, regulations, or orders with regard to the amendments made by this Act.

Study of Excessive Overtime

The Secretary of Labor is hereby instructed to commence immediately a complete study of present practices dealing with overtime payments for work in excess of forty hours per week and the extent to which such overtime work impedes the creation of new job opportunities in American industry. The Secretary is further instructed to report to the Congress by July 1, 1967, the findings of such survey with appropriate recommendations.

Canal Zone Employees and Panama Canal Study

The Secretary of Labor, in cooperation with the Secretary of Defense and the Secretary of State, shall (1) undertake a study with respect to (A) wage rates payable to Federal employees in the Canal Zone engaged in employment of the kind described in paragraph (7) of section 202 of the Classification Act of 1949 (5 U.S.C. 1082(7)) and (B) the requirements of an effective and economical operation of the Panama Canal, and (2) report to the Congress not later than July 1, 1968, the results of his study together with such recommendations as he may deem appropriate.

Study of Wages Paid Handicapped Clients in Sheltered Workshops

The Secretary of Labor is hereby instructed to commence immediately a complete study of wage payments to handi-

capped clients of sheltered workshops and of the feasibility of raising existing wage standards in such workshops. The Secretary is further instructed to report to the Congress by July 1, 1967, the findings of such study with appropriate recommendations.

Prevention of Discrimination Because of Age

The Secretary of Labor is hereby directed to submit to the Congress not later than January 1, 1967 his specific legislative recommendations for implementing the conclusions and recommendations contained in his report on age discrimination in employment made pursuant to section 715 of Public Law 88-352. Such legislative recommendations shall include, without limitation, provisions specifying appropriate enforcement procedures, a particular administering agency, and the standards, coverage, and exemptions, if any, to be included in the proposed enactment.

SUPREME COURT, U. S.

NOV 29 1967

JOHN F. DAVIS, CLERK

No. 742

In the Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF MARYLAND, ET AL., APPELLANTS

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MEMORANDUM FOR APPELLEES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MEMORANDUM FOR APPELLEES

This action was brought by the State of Maryland, subsequently joined by twenty-seven other States and one school district, to enjoin, as unconstitutional, enforcement of the 1966 Amendments to the Fair Labor Standards Act insofar as those amendments extended the minimum wage and overtime provisions of the Act to employees of the States or their political subdivisions employed in "a hospital, institution, or school" (J.S. App. 54a).[1] A three-judge district court

[1] While the 1966 Amendments also extended the minimum wage and overtime coverage to employees engaged in the operation of various transportation facilities such as railways, buses and trolleys, the States apparently do not challenge that aspect of the amendment (J.S. 3; J.S. App. 1a–2a).

denied appellants' motion for summary judgment and on the basis of stipulated facts granted the government's motion to dismiss the complaint, each judge writing a separate opinion (J.S. App. 1a–51a; 269 F. Supp. 826). Circuit Judge Winter concluded that the application of both the minimum wage and the overtime provisions of the Act to the States and their political subdivisions was constitutional. District Judge Thomsen joined Judge Winter in upholding the minimum wage provisions and in ordering that the complaint be dismissed, but expressed doubt as to the constitutionality of the application of the overtime provisions to the States, stating that that question must be decided in the context of specific situations presented in future cases.[2] District Judge Northrop was of the opinion that both the minimum wage and the overtime provisions as so applied were unconstitutional.

The primary issue raised by this case is whether Congress, in the exercise of its power to regulate interstate commerce, may constitutionally require that a State comply with the minimum wage and overtime

[2] Judge Thomsen's view requires that the "extent of the interference with an indispensable state function," alleged by appellants to be brought about by application of the Act's overtime provisions, be balanced against the "effect, if any, which the State's overtime practices have on interstate commerce." In his view, this balancing could be properly done only in "future cases presenting specific situations" concerning those overtime practices. J.S. App. 43a–45a, 269 F. Supp. at 851–852.

requirements that govern other employers operating enterprises engaged in commerce.[3]

The Tenth Amendment does not exempt the States from legislation enacted by Congress pursuant to its powers to regulate commerce. This Court has repeatedly so held. Thus, in *Sanitary District* v. *United States,* 266 U.S. 405—involving diversions of water from Lake Michigan for the City of Chicago which might adversely affect navigation—Mr. Justice Holmes, writing for a unanimous Court, stated that the power of the federal government to regulate commerce "is superior to that of the States to provide for the welfare or necessities of their inhabitants." *Id.* at 426. So also, in *United States* v. *California,* 297 U.S. 175, the Court held that the Safety Appliance Act could be constitutionally applied to a railroad operated by the State of California along the waterfront of San Francisco harbor. In so ruling, the Court rejected the argument of the State of California that in "operating the railroad without profit, for the purpose of facilitating the commerce of the port * * * it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act." *Id.* at 183. See, also, *California* v. *United States,* 320 U.S. 577; *California* v. *Taylor,* 353 U.S. 553; *Par-*

[3] Appellants apparently do not seek to challenge the lower court's determination that a school or hospital may be "an enterprise engaged in commerce" or that the enterprise concept may be relied upon to extend the Act's coverage to all employees of the enterprise, not only those whose particular jobs affect commerce. Both of those contentions were properly rejected by the court below (J.S. App. 9a–17a).

den v. *Terminal Railway of the Alabama State Docks Department,* 377 U.S. 184.[4]

We believe these decisions foreclose the argument that the Tenth Amendment is a bar to imposing the minimum wage and overtime provisions of the Act on the States and their political subdivisions in the operation of schools, hospitals and similar institutions. The stipulations of facts filed below establish that the activities of the States in operating such institutions have a substantial effect upon interstate commerce. Cf. *United States* v. *Darby,* 312 U.S. 100, 118; *United States* v. *Ohio,* 385 U.S. 9; *Wickard* v. *Filburn,* 317 U.S. 111; *National Labor Relations Board* v. *Reliance Fuel Oil Corp.,* 371 U.S. 224. Thus, we conclude that the 1966 Amendments to the Act were well within the legislative power of Congress under the Commerce

[4] Also relevant here is the decision of this Court in *Case* v. *Bowles*, 327 U.S. 92, which, although dealing with congressional action under the war power, confirms the proposition that even activities related to essential governmental functions of the States may be made subject to legislation enacted pursuant to a plenary power of the federal government. In *Case*, the Price Administrator sought to enjoin the Commissioner of Public Lands of the State of Washington from selling timber from school lands at prices above the ceiling established by regulations adopted pursuant to the Emergency Price Control Act. In upholding the Administrator's right to the injunction, the Court rejected the State's argument "that the Act cannot be applied to this sale because it was 'for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens.'" *Id.* at 101. Relying on *California* v. *United States*, *supra*, the Court held that the validity of a congressional exercise of the war power does not depend upon whether the State function affected is or is not "essential" to the State government. *Id.* at 101, 102. See, also, *Board of Trustees of the University of Illinois* v. *United States*, 289 U.S. 48.

Clause and that the court below properly dismissed the complaint.

In the absence of a substantial question, summary affirmance is of course appropriate. Rule 16(1)(c). Yet, we do not oppose plenary consideration. The questions presented are of obvious importance, affecting every State of the Union. Moreover, the separate opinions of the members of the court below cast substantial doubt on the constitutionality of the application of the overtime provisions of the Act to State employees and orderly administration suggests that this issue—which will inevitably recur—be authoritatively settled without delay.

Respectfully submitted.

ERWIN S. GRISWOLD,
Solicitor General.

NOVEMBER 1967.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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INDEX

Table of Contents

	PAGE
Reference To Opinions Below	1
Grounds of Jurisdiction	1
Questions Presented	2
Statement of the Case	3
Summary of Argument	7
Argument:	
I. Questions Nos. 1, 2, 4, 5 and 6. May the power of Congress to regulate interstate commerce be exercised in a manner which is destructive to effective State government, and does Public Law 89-601 constitute such an exercise?	9
A. Introduction	9
B. The operation of public schools and hospitals does not constitute commerce and does not affect commerce in a way which subjects them to Congressional regulation	14
C. Even if the operation of public schools and hospitals affects commerce, they are not subject to the type of regulation imposed by the Fair Labor Standards Act	27
1. The Commerce Power and Federalism — Original Intent	29
2. The Commerce Power Generally — Judicial Construction	34
D. Use of the "enterprise" concept as a determinant for coverage is an unconstitutional extension of the commerce power	68

PAGE

II. Question No. 3. Public Law 89-601, by applying the Fair Labor Standards Act to the States and their political subdivisions, violates the Eleventh Amendment to the United States Constitution 75

III. Question No. 7. Are the public schools and hospitals of the States and their political subdivisions the ultimate consumers of the goods and services purchased by them in commerce and therefore not subject to the Fair Labor Standards Act? 79

CONCLUSION 82

TABLE OF CITATIONS

Cases

Adair v. United States, 208 U.S. 161 37
Adkins v. Children's Hospital, 261 U.S. 525 35
Allen v. Regents of University System, 304 U.S. 439 ..... 57, 61, 63
Amalgamated Meat Cutters, etc. v. Fairlawn Meats, Inc., 353 U.S. 20 70
Ashton v. Cameron County, 298 U.S. 513 ..... 53, 66
Barbe v. Cummins Const. Co., 49 F. Supp. 168, 138 F. 2d 667 80
Board of Education v. Society of Alumni of L.M.H.S., 239 S.W. 2d 931 23
Board of Trustees v. United States, 289 U.S. 48 ..... 12, 52, 63
Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 35
Brooks v. United States, 267 U.S. 432 25
Brown v. Board of Education, 347 U.S. 483 ..... 10, 23
Brown v. Maryland, 12 Wheat. 419 ..... 35, 64
Building Trades Council v. Kinard, 346 U.S. 933 70
California v. Taylor, 353 U.S. 553 ..... 46, 47
California v. United States, 320 U.S. 577 48
Caminetti v. United States, 242 U.S. 470 24

	PAGE
Carlberg v. Metcalf, 120 Neb. 481, 234 N.W. 87	23
Carter v. Carter Coal Co., 298 U.S. 238	37
Case v. Bowles, 327 U.S. 92	52, 54
Chisholm v. Georgia, 2 Dall. 419	76
City of Tacoma v. Taxpayers, 357 U.S. 320	52, 53, 54
Collector v. Day, 11 Wall. 113	57
Cooley v. Board of Wardens, 12 How. 299	35
Cooper v. Aaron, 358 U.S. 1	10
Duhne v. State of New Jersey, 251 U.S. 311	77
Edwards v. California, 314 U.S. 160	24
Gibbons v. Ogden, 9 Wheat. 1	35, 36, 53, 65
Goldberg v. Ed's Shopworth Supermarket, 214 F. Supp. 781	70, 71
Gomillion v. Lightfoot, 364 U.S. 339	38
Gordon v. Paducah Ice Mfg. Co., 41 F. Supp. 980	80
Hall v. DeCuir, 95 U.S. 485	35
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Hans v. State of Louisiana, 134 U.S. 1	77
Heart of Atlanta Motel v. United States, 379 U.S. 241	39, 42, 43
Helvering v. Gerhardt, 304 U.S. 405	57, 63
Helvering v. Powers, 293 U.S. 214	57
Hopkins Fed. S. & L. Asso. v. Cleary, 296 U.S. 314	34, 53
Howell Chevrolet Co. v. N.L.R.B., 346 U.S. 482	70
Jackson v. Northwest Airlines, 75 F. Supp. 32, 185 F. 2d 74, 342 U.S. 812	80
Katzenbach v. McClung, 379 U.S. 294	39, 42, 43
Kirschbaum Co. v. Walling, 316 U.S. 517	69, 79
License Cases, The, 5 How. 504	35, 38
Lochner v. New York, 198 U.S. 45	35
Louisiana v. United States, 380 U.S. 145	78
Lynch v. Embry-Riddle Co., 63 F. Supp. 992	80
Marshall v. Donovan, 10 Bush 681	23
M'Culloch v. Maryland, 4 Wheat. 316	35, 41, 56, 67

	PAGE
McLeod v. Threlkeld, 319 U.S. 491	69
Metcalf v. Mitchell, 269 U.S. 514	58
Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207	25, 69
Mitchell v. Pilgrim Holiness Church Corp., 210 F. 2d 879	24
Mitchell v. Zachry Co., 362 U.S. 310	69, 79
Morehead v. New York, 298 U.S. 587	35
Morgan v. Commonwealth of Virginia, 328 U.S. 373	35
Muller v. Oregon, 208 U.S. 412	35
N.L.R.B. v. Building Service Employees, Local 254, 376 F. 2d 131	50, 51
N.L.R.B. v. Central Disp. & E. Hosp., 145 F. 2d 852	25
N.L.R.B. v. Denver Bldg.-Constr. Trades Council, 341 U.S. 675	70
N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1	11, 39
N.L.R.B. v. Reliance Fuel Oil Corp., 371 U.S. 224	70
New Hampshire v. Louisiana, 108 U.S. 76	76, 78
New York v. United States, 326 U.S. 572	56, 57, 60, 64, 65, 67, 68
Ohio v. Helvering, 292 U.S. 360	57
Oklahoma v. Atkinson Co., 313 U.S. 508	52, 54
Overstreet v. North Shore Corp., 318 U.S. 125	68
Panama Refining Co. v. Ryan, 293 U.S. 388	37
Parden v. Terminal R. Co., 377 U.S. 184	46, 48, 77
Passenger Cases, The, 7 How. 283	35
People v. Jackson-Highland Bldg. Corporation, 400 Ill. 533, 81 N.E. 2d 578	23
Pierce v. State of New Hampshire, 5 How. 504	36
Plumbers, etc. Local 298 v. Door County, 359 U.S. 354	70
Polish Nat. Alliance v. N.L.R.B., 322 U.S. 643	44
Powell v. United States Cartridge Co., 339 U.S. 497	25
Public Building Authority of Birmingham v. Goldberg, 298 F. 2d 367	25

	PAGE
Radio Corp. of America v. United States, 95 F. Supp. 660, 341 U.S. 412	2
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San Diego Building Trades Council v. Garmon, 353 U.S. 26	70
Sanitary District v. United States, 266 U.S. 405	52, 53
Schechter Poultry Corp. v. United States, 295 U.S. 495	37
School Dist. No. 3 of Town of Adams v. Callahan, 237 Wis. 560, 297 N.W. 407	23
Simmons v. South Carolina State Highway Department, 195 F. Supp. 516	77
Slaughterhouse Cases, The, 16 Wall. 36	35
South Carolina v. United States, 199 U.S. 437	57, 63
Southern Pacific Co. v. Arizona, 325 U.S. 761	35
Stafford v. Wallace, 258 U.S. 495	2
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State of Colorado v. United States, 219 F. 2d 474	50
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Talbott v. Independent School Dist. of Des Moines, 230 Iowa 949, 299 N.W. 556	23
Thornton v. United States, 271 U.S. 414	24, 25
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United States v. Butler, 297 U.S. 1	37
United States v. California, 297 U.S. 175	45, 65, 67
United States v. Darby, 312 U.S. 100	11, 39, 40, 49, 69
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PAGE

United States v. Oregon, 366 U.S. 643 53
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United States v State Road Department of Florida, 255 F. 2d 516 62
United States v. Washington Toll Bridge Authority, 307 F. 2d 330 ..... 62, 64
United States v. Wrightwood Dairy Co., 315 U.S. 110 ..... 18, 41
Walling v. Jacksonville Paper Co., 317 U.S. 564 69
West v. Wal-Mart, Inc., 264 F. Supp. 158 72
West Coast Hotel Co. v. Parrish, 300 U.S. 379 35
West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 28
Wickard v. Filburn, 317 U.S. 111 ..... 19, 34, 39, 42
Wilmette Park Dist. v. Campbell, 338 U.S. 411 61
Wilson v. Black Bird Creek Marsh Co., 2 Pet. 245 35
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Woodruff v. Parham, 8 Wall. 123 35
Zorach v. Clauson, 343 U.S. 306 28

Statutes

Annotated Code of Maryland (1957 Edition):
Article 43, Section 599 20

Constitution of the United States:
Article I—
Section 4 31
Section 8 ..... 2, 3, 48, 66
Article IV, Section 3 ..... 15, 31
Article V 31
Tenth Amendment 3, 33, 40, 41, 45, 68
Eleventh Amendment 3, 8, 74, 76, 77, 78, 79
Fourteenth Amendment 35
Fifteenth Amendment 79

PAGE

United States Code:

Title 28—

Section 1253 2
Section 1337 1
Section 2201 1
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Section 2282 ..... 1, 2
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Section 203 70
Sections 206, 207 74
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 742

STATE OF MARYLAND, ET AL.,
Appellants,

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF APPELLANTS

REFERENCE TO OPINIONS BELOW

The District Court rendered three separate Opinions in the case below, which are reported in 269 F. Supp. 826 (1967). A copy of said Opinions and a copy of the subsequent Order thereon are set forth in the Appendix hereto, pp. 1a-51a.

GROUNDS OF JURISDICTION

This action was originally instituted by the State of Maryland in the District Court for the District of Maryland pursuant to Title 28, U.S. Code, Sections 1337, 2201, 2202, 2282 and 2284 to declare the application of the Fair Labor Standards Act (Title 29, U. S. Code, Sections 201, *et seq.*) to employees of the State and its political subdivisions, as

provided by Public Law 89-601, to be in violation of the United States Constitution and to enjoin the various defendants from so enforcing the Act. Twenty-seven other States and one school district subsequently joined Maryland as parties plaintiff. A three-judge court, convened pursuant to Title 28, U. S. Code, Sections 2282 and 2284, rendered three Opinions on June 13, 1967, two of which held that the declaratory and injunctive relief requested by Appellants should be denied. On June 26, 1967, a final judgment was entered by the court which denied the relief and dismissed the Complaint. A Notice of Appeal to this Court was filed in the United States District Court for the District of Maryland on August 24, 1967.

This is a direct appeal from the judgment of the three-judge District Court denying, after notice and hearing, a permanent injunction in a civil action required by Title 28, U. S. Code, Section 2282 to be heard by a three-judge court. This Court has jurisdiction to consider this appeal under Title 28, U. S. Code, Section 1253. *Radio Corp. of America v. United States* (D.C.-Ill., 1950), 95 F. Supp. 660, *aff'd* 341 U.S. 412, 71 S. Ct. 806, 95 L. Ed. 1062; *Stafford v. Wallace* (1922), 258 U.S. 495, 42 S. Ct. 397, 66 L. Ed. 735.

QUESTIONS PRESENTED

1. Did the Congress of the United States, in enacting Public Law 89-601, exceed its power to regulate interstate commerce granted under Article I, Section 8 of the United States Constitution, insofar as said Public Law 89-601 purports to extend the provisions of the Fair Labor Standards Act to the school systems and hospitals of the States and their political subdivisions?

2. Did the Congress of the United States, in enacting Public Law 89-601, infringe upon powers reserved to the

States under Article X of the Amendments to the United States Constitution, insofar as Public Law 89-601 purports to extend the provisions of the Fair Labor Standards Act to the school systems and hospitals of the States and their political subdivisions?

3. Did the Congress of the United States, in enacting Public Law 89-601, authorize the violation of Article XI of the Amendments to the United States Constitution, insofar as said Public Law 89-601 purports to authorize actions by or on behalf of private citizens against the States in United States District Courts?

4. Under our dual system of government, does the Congress of the United States have the constitutional authority to regulate a State in the performance of its *necessary* governmental functions?

5. Does the Congress of the United States have the authority to require a State Legislature or the governing body of any political subdivision thereof to either levy and collect taxes for a particular purpose or curtail or discontinue necessary governmental services?

6. Does a State, in the performance of its necessary governmental functions, engage in commerce within the meaning of Article I, Section 8 of the Constitution of the United States?

7. Are state and local school systems and hospitals ultimate consumers within the meaning of Section 3(i) of Public Law 89-601 and, therefore, not subject to the provisions of said law?

STATEMENT OF THE CASE

Public Law 89-601, which became effective February 1, 1967, purports to extend the minimum wage and maximum hour provisions of the Fair Labor Standards Act (Title 29,

U. S. Code, Sections 201, *et seq.*) to public elementary and secondary schools, institutions of higher education, and hospitals owned and operated by the States and/or their political subdivisions. The funds necessary to operate such schools, institutions and hospitals, and therefore to pay any increased wages occasioned by application of the Act, are required by the Constitutions of all of the Appellant States to be appropriated by their respective legislatures, generally pursuant to an Executive Budget system, and to be funded by taxes.

The factual record in this case consists of extensive stipulations agreed to between the parties. Three States — Maryland, Texas and Ohio — were used as representative States to show (1) the extent to which the activities of the affected institutions and agencies thereof may "affect" interstate commerce, and (2) the financial and political effect of the Act upon State government and governmental activities.

With respect to (1) above, the facts show that the local public schools and hospitals spend a great deal of money purchasing goods from other States. The mass of detail contained in the exhibits or stipulations emanating from the Appellees only serve to bear out this fact. It is these expenditures which formed the basis of the District Court's conclusion that there was a sufficient nexus with interstate commerce, or effect thereon, to make the agencies subject to Congressional regulation. The facts further show, however, that other agencies of State government, such as the Governor's office, the Legislature, the Judiciary, the Attorney General, etc. also spend funds for out-of-State purchases, and that they too affect commerce. In 1965, for example, the Baltimore City Police Department spent over $400,000.00 for motor vehicles, many or all of which were produced out-of-State (Appendix p. 75a).

With respect to (2), the facts, or the inferences fairly deducible therefrom, show:

1. Most of the States already pay the federal minimum wage to their employees. The instances of substantially subminimum wages are very limited. The main effect on the States is the requirement of paying a 50% premium for overtime hours. Most of the States (like the federal government) compensate their employees for overtime hours by the device of "compensatory time". If an employee works six hours overtime, he is permitted to take off six hours at another time and he can generally accumulate his compensatory time in order to take off whole days instead of hours. In this way, he is in effect paid "straight time" for his overtime hours. Public Law 89-601 provides that, unless the compensatory time is given within the same pay period, the State must pay the 50% premium for overtime hours and can no longer use the device of compensatory time. The agreed facts show that in many instances it is impossible or impracticable to give compensatory time during the same pay period.

2. The resulting financial impact (of paying the 50% premium) to the State of Maryland during the first, and least expensive, year of operation under the Act would be nearly $2,500,000.00. This figure does not include the additional indirect cost of paying the premium to State employees not directly covered under Public Law 89-601 but who, by State law, must be treated equally with the federally covered employees. This additional cost is estimated for the first year to be $1,884,000.00. The total effect of the Act on Maryland, therefore, would be almost $4,400,000.00 for the first year (Appendix p. 76a). As the required minimum scale increases under the Act (for the States, it jumps from $1.00 an hour to $1.60 an hour over a five-year period), the cost will increase both in overtime penalties and in meeting the higher minimums.

No attempt was made to extrapolate the Maryland figures nationwide. Texas estimated its additional costs for a single year as over $13,000,000.00, excluding the additional costs to the 1,300 school districts. If the direct Maryland cost of $2.5 million is merely multiplied by 50 (which, because of her small size and generally high wage rates, is probably conservative), the national cost to the States would exceed $125,000,000.00 annually.

3. In addition to the adverse financial impact — or rather as a corollary to it — there is the more fundamental effect on State government itself. The affected agencies, unlike private industry, do not meet their costs by raising prices or increasing productivity. Schools and hospitals are not subject to annual productivity increases. Instead, their funds must, by State Constitutional requirement, come from legislative appropriations. The agencies will estimate their needs a year and a half in advance and submit a budget. That budget or a revision of it must then be enacted into law by the State legislature. The immediate effect of Public Law 89-601, in this connection, is

(a) To jeopardize the stability of the State budgetary system by making amounts requested and appropriated subject to change by independent Congressional action, possibly, as in the actual case of Public Law 89-601, in the middle of a fiscal year. Thus, a school board which requested and had appropriated to it "X" dollars based upon existing lawful scales may find that Congress has increased the cost to "Y" dollars in the middle of the year.

(b) In such an event, unless a special session of the legislature were called, State officials would be put in the position either of ignoring the federal law or violating State law by expending more than has been appropriated.

(c) If a special session of the legislature were called, its calling would not be a voluntary act, but one required by federal law. The additional appropriations and taxes necessary to support the higher costs would be dictated by federal law. In other words, the legislature would not be performing its traditional legislative function but merely responding in ministerial fashion to the Congressional fiat.

The clash of the two considerations — the effect of the State agencies on interstate commerce and the impact of the Act upon the States — gives rise to the constitutional issues. In the District Court, the issues were raised in the form of cross-motions for summary judgment (the Appellees' motion being, in the alternative, a motion to dismiss). On June 13, 1967, the court rendered three Opinions as follows: (1) Judge Winter held the entire Act, as applied to the States and their subdivisions, to be constitutional; (2) Judge Northrop held the entire Act, as so applied, to be unconstitutional; and (3) Judge Thomsen held the minimum wage provisions of the Act, as so applied, to be constitutional, but expressed doubt as to the constitutionality of the overtime provisions.

SUMMARY OF ARGUMENT

When Congress first enacted the Fair Labor Standards Act, it did so in order to curb or alleviate certain specific conditions, which apparently did not exist with respect to State employment. The extended coverage in Public Law 89-601 was based on the assertion that public schools and hospitals are in "substantial competition" with private counterparts, and that their regulation was essential to the effectiveness of the overall regulation. The facts show, however, that this assertion is untrue; for example, less than 1% of the children in this country attend nonpublic, nonreligiously-affiliated schools.

Coverage on the theory that these institutions buy goods and services from out-of-State would enable Congress to regulate every official and agency of State government, a power which neither was contemplated by the Convention in 1787 nor has ever been countenanced by this Court. The schools and hospitals are especially unique — unlike State-owned railroads or other commercial enterprises — and do not constitute or engage in commerce.

Even if they do engage in commerce, however, they are not subject to the type of regulation imposed by Public Law 89-601. The thrust of the Act goes beyond the schools and hospitals and strikes at the heart of State government. It permits Congress to override State budgetary systems, to nullify State Constitutional provisions relating to the manner of appropriating funds and levying taxes for the support of State and local government, and to remove the discretion of State legislatures in determining the scope and character of State government. No decision of this Court has ever permitted such an assertion of federal power.

To the extent that coverage is asserted under the "enterprise" test, it is unconstitutional as an unlimited extension of the commerce power. It permits Congress to regulate activities which may have, at the most, a remote and inconsequential effect on commerce.

In addition, by including State agencies within the definition of "employer", the Act authorizes private citizens to sue the States for civil damages in federal courts, in direct contravention of the Eleventh Amendment.

Finally, it is asserted that the public schools and hospitals are the ultimate consumers of whatever goods and services they purchase in commerce and that, by statutory construction, they are exempt from the Act.

ARGUMENT

I.

QUESTIONS NOS. 1, 2, 4, 5 AND 6

MAY THE POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE BE EXERCISED IN A MANNER WHICH IS DESTRUCTIVE TO EFFECTIVE STATE GOVERNMENT, AND DOES PUBLIC LAW 89-601 CONSTITUTE SUCH AN EXERCISE?

A. INTRODUCTION

The questions presented in this appeal as set forth in the Appellant's Jurisdictional Statement, as well as in this Brief, are listed as seven in number. A reading of them will indicate, however, that Nos. 1, 2, 4, 5 and 6 are, in the context of the facts of the case, essentially the same. The variety in their wording was thought necessary in order to present all facets of a complex problem to the Court. The overriding issue common to all five of these questions, however, is whether the maintenance of an effective dual system of Government — the federal system — which necessarily requires strong autonomous State governments, is an implied limitation upon an otherwise unlimited Congressional power to regulate interstate commerce.

Appellants contend that the operation of public schools and hospitals do not constitute commerce and do not affect commerce in a way which makes them subject to direct Congressional regulation. Furthermore, Appellants assert that, even if such schools and hospitals should affect commerce, they are not subject to the type of regulation contained in the Fair Labor Standards Act, because such regulation goes beyond these particular agencies and seriously impairs the essential internal processes of State government itself.

Never before in the history of this nation has the federal government presumed to enact a law which, both in theory

and in practice, serves as the basis for the utter destruction of the State as a sovereign political entity. At issue here is not a mere inconsistency between State and federal law. Neither is it a question of whether some incidental function or activity engaged in by a State may be subject to federal regulation under a general, nondiscriminatory law. And it is not even a question of whether the government can exercise some form of control over the public school system or public health services. See *Brown v. Board of Education* (1954), 347 U.S. 483, and *Cooper v. Aaron* (1958), 358 U.S. 1.

The issue here, simply, is whether, by virtue of its power to regulate interstate commerce, Congress has the ability to require state legislatures to levy taxes in excess of what they otherwise would levy, to appropriate funds in excess of what they otherwise would appropriate and for purposes for which they would not otherwise provide them, or, in the alternative, to require that elected and appointed State officials violate the Constitution and laws of their state. Also at issue is whether purely State matters — taxes, appropriations, merit systems, public schools and hospitals — are subject to an overriding Congressional control.

As will be developed, if the test of Congressional jurisdiction is merely whether the particular activity affects commerce, then each and every function carried on by State and local governments is so regulable. The plain, inescapable meaning of such a test is that States exist only at the sufferance of Congress and, by indirection, it lies within the power of Congress to convert them into federal districts. No case known to Appellants has ever gone this far.

There has, in the history of this nation, been only one reported instance where the federal government has considered (much less attempted) regulating the wages and

hours of State and local government employees. In 1942, the National War Labor Board considered the question of its jurisdiction over labor disputes between such employees and their sovereign employers. This matter, it is noted, was decided after the decisions in *United States v. Darby* (1941), 312 U.S. 100, and *N.L.R.B. v. Jones & Laughlin Steel Corp.* (1936), 301 U.S. 1.

The Board determined that neither it nor the federal government generally had jurisdiction in the matter of state employment (Case No. 47, Case No. 726, National War Labor Board, December 23, 1942, reported in *Labor Unions and Municipal Employee Law,* Charles S. Rhyne, 1946, pp. 226, *et seq.*). In so deciding, it stated:

> "The states have the undisputed power to regulate working hours of those who are deemed to require special protection of the state. Thus, the United States Supreme Court has upheld the validity of state statutes regulating the hours of work of children and women. It has never been suggested that the state lacks power to limit the hours of labor of its own employes. Rather, it has been held to be within the power of the state to limit the hours of labor of those in its employ. Furthermore, the multitude of details pertaining to the compensation of municipal employes may be governed either by statutory, charter, or ordinance provisions.
>
> "It has never been suggested that the Federal Government has the power to regulate with respect to the wages, working hours, or conditions of employment of those who are engaged in performing services for the states or their political subdivisions. Any action by the National War Labor Board in attempting to regulate such matters by directive order would be beyond its power and jurisdiction. The employes involved in the instant cases are performing services for political subdivisions of state governments. *Any directive order of the National War Labor Board which purported to regulate the wages, the working hours, or the conditions of employment of state or municipal employes would constitute a clear invasion of the sovereign*

rights of the political subdivisions of local state government." (Emphasis supplied.)

It may be noted that the Board was unanimous in this decision, the industry and labor members concurring.

The only area of unanimous agreement in the District Court was that this was a case of first impression. Even Judge Winter, who upheld the Act in its entirety, and gave the broadest construction to the commerce power, conceded that "the precise claim of unconstitutional interference with state sovereignty made in this case has not been adjudicated by any court". 269 F. Supp. at page 837. He concluded, however, on the basis of *Board of Trustees v. United States* (1933), 289 U.S. 48, that "the specific and peremptory rejection of the argument that the principle of duality in our system of government may limit in any way the authority of Congress to regulate commerce is dispositive of the present case". 269 F. Supp. at page 840.

Judges Thomsen and Northrop declared that the federal system created by the Constitution was an implied restriction on Congressional power, differing only as to where the limits were to be drawn. Because this is a case of first impression, and because it brings into conflict one of the most important powers of the national government with what Appellants and most political scientists regard as the cornerstone of our American political system, a complete review of both the power and its asserted limitations is in order. It is not enough to take dictum from the past and apply it blindly to a situation which the Court has not previously considered. Instead, a fresh look at what the people intended to create in 1787 should be had, as well as a realistic analysis of how this Court has balanced the delicate federal-state relationship since then.

In approaching the problem by historical analysis, Appellants do not contend that the ideas expressed in 1787

must be controlling now, or that decided cases since then must be ignored. They urge only that the erosion of State authority and integrity which we have experienced in the past several decades is neither inexorable nor inevitable and that, with this last and most serious attempt actually to regulate the scope of State and local *government*, it is time to reconsider just what kind of constitutional system we really have.

Leonard D. White expressed the need for such a reconsideration in 1953, when he stated:[1]

> "The time has come to reconsider the present condition of the states in the federal system and to take sober account of the consequences of the trends that have so long been at work against them. I do not assert that the states are in immediate danger, nor that much that has happened in transferring power and influence upward has been harmful. I do predict, however, that if present trends continue for another quarter century, the states may be left hollow shells, operating primarily as the field districts of federal departments and dependent upon the federal treasury for their support. This result would be bad for the federal government and would hold grave consequences for the kind of self-governing, local democracy that has been an essential part of our way of life."

The fear expressed by Mr. White fourteen years ago has become far more real and serious as a result of Public Law 89-601. Both the enormous thrust of the Act and the nonchalant — almost cavalier — fashion in which the public school system was subjected to it show that Congress has no apparent concern for the maintenance of a true federal system. But the Constitution created such a system, and resort must be had to this Court to save it.

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[1] Leonard D. White, *The States and the Nation*, Louisiana State University Press (1953), p. 2.

B. THE OPERATION OF PUBLIC SCHOOLS AND HOSPITALS DOES NOT CONSTITUTE COMMERCE AND DOES NOT AFFECT COMMERCE IN A WAY WHICH SUBJECTS THEM TO CONGRESSIONAL REGULATION.

In the District Court, the principal argument of the Appellees in favor of the Act's validity, and that which was accepted to a greater or lesser degree by Judges Winter and Thomsen, was that, since the schools and hospitals of the States affected commerce *by the volume of their purchases,* they were regulable under the commerce clause. As will be seen, however, this was not the basis upon which Congress enacted the law.

When Congress first enacted the Fair Labor Standards Act in 1938, it left no doubt as to its purpose. Section 2(a) of the Act stated:

> "The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

Apparently, Congress did not find any of these unfortunate situations to exist with respect to State or local governmental employment (or perhaps it found that States were not "in industries engaged in commerce or in the production of goods for commerce") because, in Section 3,

it excluded from the provisions of the Act "any State or political subdivision of a State". Since 1938, the Act has been amended at least seven times, excluding Public Law 89-601, but throughout all of these amendments over a twenty-five year period, no serious attempt was made to bring the States and their political subdivisions within the Act. In no part of the legislative history of any of these amendatory Acts is there any suggestion that States are involved in industries engaged in commerce or in the production of goods for commerce, or that any of the detrimental effects which gave rise to the original Act were present in State or local government employment.

The legislative history of the Act contains no discussion of the history of the original exemption, except that it was in the bill from the beginning, and was never deleted. It would seem to reflect, however, the awareness and concern of Congress over the constitutionality of the Act and the bill was drawn with this very much in mind. See House Rpt. No. 1452, 75th Congress, 1st Sess., p. 9, August 3, 1937.

In 1966, Congress enacted Public Law 89-601 which removed the legislative exemption of State and local governments in the area of schools and hospitals. The legislative history of Public Law 89-601 began on January 4, 1965, when the President, in his State of the Union Message, advocated the "extension of the minimum wage to more than 2 million unprotected workers": U. S. Code Congressional and Administrative News, 89th Congress, 1st Session, No. 1, p. 9. On January 28, 1965, the President submitted his Economic Report to Congress (H. Doc. No. 20, 111 Congressional Record 1402), wherein he again recommended coverage "for an additional 2 million workers".

On May 18, 1965, a Special Message from the President on amending the Fair Labor Standards Act was delivered to Congress (H. Doc. No. 176, 111 Congressional Record

10399). The President therein urged extension of the law to cover an additional 4,500,000 workers and submitted a draft bill to accomplish that purpose. The Administration Bill (S. 1986, H.R. 8260) did *not* remove the existing exemption for States or their subdivisions.

The Bills were referred to the respective Labor Committees of each house, where they were substantially revised. Separate bills had also been introduced by Congressman Roosevelt (H.R. 8260 and H.R. 10518), which were also referred to the Labor Committee. The House Bill, as reported by the House Labor Committee (renumbered H.R. 13712) was expanded to cover 7,200,000 workers. In its Report (No. 1366, 89th Congress, 2nd Session) the Committee noted that there were some sixty million wage and salary workers in the United States, of which less than twenty-seven million were then covered by the Act. A large number of the sixty million, said the Report,

> "are beyond the scope of the Act's practical, possible, or needed coverage. But of the 47 million workers *in private industry* who might be brought within the coverage of the wage and hour guarantees, 17½ million are not in fact covered." (Emphasis supplied.)

Notwithstanding the apparent concern only for persons employed in "private industry", the Committee recommended removal of the exemption of state and local governments with respect to hospitals, institutions of higher education and schools for mentally-handicapped or gifted children. Removal of the exemption with respect to the public elementary and secondary schools was not recommended. On the floor of the House, an amendment was offered removing the exemption for public schools, which was passed without debate.

In the Senate, the Labor Committee reported a Bill which, with respect to the matter involved here, was similar to the one recommended by the House Labor Commit-

tee. It covered hospitals, institutions of higher education and special schools for mentally-handicapped or gifted children, but not the general public school system. In commenting on the House action, the Senate Labor Committee noted:

> "The committee amended the House bill to delete from coverage employees of public and private elementary and secondary schools. By this action, approximately 900,000 employees were removed from coverage of the bill. *Coverage for elementary and secondary schools was adopted during House consideration of H.R. 13712 and without the benefit of hearings or prior consideration of the amendment.* By exclusion of these employees from coverage under the Senate reported bill, the committee is not passing upon the merits of extending coverage of the act to employees of elementary and secondary schools. *It believes that this amendment should be the subject of hearings and further consideration in future amendments to the act. The committee was also concerned about the impact which a possible increase in wages for such employees might have upon local school districts that depend in part upon tax dollars for operating revenues.*" (Emphasis supplied.)

In this connection, it is believed, and therefore asserted as fact, that not one State, State agency, school district, public hospital, or other affected entity was ever officially notified of the pendency of these bills, or asked to present its views. Except for the comment in the Senate Labor Committee Report, quoted above, there is nothing in the legislative history to indicate that any consideration was given to the repercussions of the amendment as finally adopted.

The Senate passed the bill essentially as recommended by its Labor Committee — covering nonfederal hospitals, institutions of higher education, and special schools, but not the general public school system. The last two bills

then were referred to Conference Committee. In its Conference Report No. 2004, the Committee adopted the House version without assigning any reasons therefor. The Congress thereafter enacted the bill as so reported, and it was later signed by the President.

The reasoning behind extending the coverage of the Act to State and local government employees can only be gleaned from the respective Labor Committee Reports, since there was no apparent debate on the subject on the floor of either house. The House Labor Committee stated that:

> "These enterprises (i.e., schools and hospitals, etc.) which are not proprietary, that is, not operated for profit, are engaged in activities *which are in substantial competition with similar activities carried on by enterprises organized for a business purpose. Failure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which 'constitute an unfair method of competition in commerce'.*" (Emphasis supplied.)

In discussing the "fact" of competition, the Committee was referring exclusively to the minimum wage, and made no mention of the overtime provisions of the Act, although the same basis would appear to be equally applicable to overtime premiums as well. The Committee's sole concern, however, was that these institutions pay "this bare minimum". The Senate Labor Committee's Report parroted the above quotation from the House Committee Report verbatim. *Thus, the only rationale for intruding into the area of State and local government employment was that the newly-covered activities were in "substantial competition" with similar private commercial organizations.* In other words, Congress was using the rationale of *United States v. Wrightwood Dairy Co.* (1942), 315 U.S. 110, and, to a

certain extent, *Wickard v. Filburn* (1942), 317 U.S. 111, to include within the scope of its regulation those State activities which it considered to be in substantial competition with activities clearly regulable.

In *Wrightwood*, the question was whether the competition between milk produced locally and milk produced for interstate commerce was a sufficient basis for regulating the local product. The facts showed that 40% of the milk needs of Chicago were met from milk produced out-of-State, the balance being produced in Illinois. The fact of, and substantiality of, the competition, according to the Court, demonstrated the effect of the local product on interstate commerce, and thereby authorized its regulation. *Wickard* was in the same vein. The accumulated total of all the homegrown wheat produced on small farms was sufficient to have a substantial impact on the market price of wheat generally.

Contrary to the unsupported assertions of the House Labor Committee and as distinguished from *Wrightwood*, *Wickard* and similar cases, the facts here generally (and especially the facts stipulated to by the parties hereto) illustrate quite clearly that there is no real competition in these areas, and that the wage and hour terms of the affected public employees have little or no effect on that phase of commerce which Congress was attempting to regulate.

The stipulations filed herein show that in Maryland, which, together with Texas and Ohio, is declared to be representative of the other forty-seven States, 84.3% of all children attending elementary and secondary schools are in the public school system. The largest "competitor" are non-profit schools owned by or affiliated with religious organizations, which account for another 14.3%. When the other State-run schools (such as the training schools and the

programs in the mental hospitals) are considered, it is found that slightly over 1% of all Maryland children are attending elementary or secondary schools "carried on by enterprises organized for a business purpose" (Appendix, p. 67a).

With respect to the hospitals, the facts show that 100% of the tubercular patients in Maryland are in State hospitals, because there are no private hospitals with tubercular beds. The facts show that 94.4% of all mental patients in Maryland are confined either in State hospitals (91.6%) or in hospitals owned and operated by religious organizations (2.8%). They further show that, under State law, every patient in a State-operated chronic disease hospital is there because "the special facilities required by their conditions are not otherwise obtainable elsewhere in Maryland". Article 43, Section 599, Annotated Code of Maryland (Appendix, p. 70a).

On a national scale, figures published by the United States Department of Health, Education and Welfare show that in the fall of 1961 (the latest date for which a complete breakdown is available) there were 43,240,670 children attending elementary and secondary schools. Of these, 37,504,190, or 86.73%, attended the public schools, 5,496,529, or 12.71%, attended religiously-affiliated schools, and only 239,951, or 0.56%, were enrolled in nonpublic, nonreligiously-affiliated schools.[2]

To claim the need to regulate between 99 and 99.5% of an "industry" because it is in "substantial competition" with the privately-owned and -operated ½ to 1% which is legitimately regulable is the most extreme example of the tail wagging the dog. As a basis for regulating such a vital

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[2] *Enrollment, Teachers and Schoolhousing*, U. S. Dept. of Health, Education and Welfare, OE-20007-61, p. 10; Statistics of Nonpublic Elementary Schools — 1961-62, OE-20064-62; Statistics of Nonpublic Secondary Schools 1960-61, OE-20050.

State function, this "finding" of the House Labor Committee is simply improper. It is utterly devoid of any factual support.

In order to justify the Act, therefore, the Appellees, and a majority of the court below, relied not on the question of competition, but on the fact that the schools and hospitals affect commerce in other ways — by purchasing goods and services from out-of-State, accepting federal funds and engaging in correspondence with persons out-of-State. This is the basis upon which it was held that Public Law 89-601 (or at least the minimum wage provisions of it) is constitutional. In examining this contention, however, we find that there was no evidence offered to show that the application or nonapplication of the federal standards will have even the slightest effect on (1) the volume of purchases made in interstate commerce, (2) the amount of correspondence carried on with persons out-of-State, or (3) the inflow of federal funds.

The States are committed to providing public education and, in certain areas, public hospital facilities. To carry out these functions, they will be required to purchase a certain amount of materials and supplies; but the amount of such purchases will not, as in private, profit-making industry, depend on the nature of the relationship with their employees.

The wages and hours of janitors, dieticians, and other affected employees will hardly affect the amount of drugs, X-ray equipment, desks, blackboards or other supplies purchased by the State hospitals and schools. In light of the Congressional concern over the low wages of hospital employees, as expressed in the Labor Committee Reports, and the need to regulate State hospitals as competing institu-

tions, it is interesting to note that the stipulated facts herein, derived from exhibits prepared by Appellees, show the average wage in State and local government hospitals for 1965 to be $4,381.00. This is 8.7% higher than the average wage paid by nongovernmental hospitals, and 116% higher than the federally-required minimum for 1967. The facts further show the average hourly earnings of nonsupervisory personnel in State and local government hospitals to be 6% above that for nongovernment hospital personnel, and 94% above the federally-required minimum. (Appendix, p. 122a).

No evidence was offered below, and there was nothing in either of the two Committee Reports, or in any other part of the legislative history of Public Law 89-601, to show that there was an inordinate number of work stoppages in the public schools and hospitals, or that such stoppages which did occur were due to wages below the federal minimum, or that they substantially affected or burdened commerce. In short, the whole basis of the extended coverage to State personnel rests on surmise and speculation, and no real connection with interstate commerce has been demonstrated. It would take a major strike — probably of persons, like teachers, who are not even subject to the Act — for an extended period of time before interstate commerce would "feel the pinch"; and there was no evidence below that such strikes have occurred, or are likely to occur.

The word "commerce" may be very broad, but it does not encompass every form of activity. The word "commerce" in its most liberal sense has certain limitations and, since it is used in the context of a grant of power in an organic instrument of government, whatever limitations may attach to it, or circumscribe it, are *constitutional* in nature. Thus, if a particular form of activity is not com-

merce, it is constitutionally not commerce, and Congress cannot regulate it simply by declaring it to be commerce.

So it is with public schools and hospitals. There can be no doubt that the creation, maintenance and control over a system of public education is a State governmental function. This has been recognized judicially. *Marshall v. Donovan* (Ky., 1874), 10 Bush 681; *Talbott v. Independent School Dist. of Des Moines* (1941), 230 Iowa 949, 299 N.W. 556; *Board of Education v. Society of Alumni of L.M.H.S.* (Ky., 1951), 239 S.W. 2d 931; *State v. D'Aulisa* (1947), 133 Conn. 414, 52 A. 2d 636; *Carlberg v. Metcalf* (1930), 120 Neb. 481, 234 N.W. 87; *School Dist. No. 3 of Town of Adams v. Callahan* (1941), 237 Wis. 560, 297 N.W. 407; *State v. Brand* (1937), 214 Ind. 347, 5 N.E. 2d 531; *People v. Jackson-Highland Bldg. Corporation* (1948), 400 Ill. 533, 81 N.E. 2d 578; *Brown v. Board of Education* (1954), 347 U.S. 483.

Every State in the Union has a free public school system administered or supervised by State authorities. In most States, the provision of such a system is required by Constitutional mandate.[3] The stipulations filed in this case

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[3] See for example, the Constitutions of Arizona (Article XX, Section 7; Article XI, Section 1), Arkansas (Article XIV, Section 1), Delaware (Article X, Section 1), Florida (Article XII, Section 1), Idaho (Article IX, Section 1), Illinois (Article VIII, Section 1), Indiana (Article VIII, Section 1), Kansas (Article VI, Section 2), Kentucky (Section 183), Maryland (Article VIII, Section 1), Michigan (Article XI, Section 9), Minnesota (Article VIII, Section 1), Montana (Article XI, Section 1; Ord. I, Section 4), Nebraska (Article VII, Section 6), Nevada (Article XI, Section 2), New Mexico (Article XII, Section 1; Article XXI, Section 4), New Jersey (Article VIII, Section IV-1), New York (Article XI, Section 1), North Dakota (Article VIII, Sections 147, 148), Oklahoma (Article I, Section 5; Article XIII, Section 1), Oregon (Article VIII, Section 3), Pennsylvania (Article X, Section 1), South Dakota (Article XXVI, Section 18(4)), Texas (Article VII, Section 1), Utah (Article X, Sections 1, 2), Virginia (Article IX, Section 129), Washington (Article IX, Section 2; Article XXVI), West Virginia (Article XII, Section 1), Wyoming (Article VII, Section 1; Article XXI, Section 28).

bear witness both to the extent of the State commitment in this area and the lack of any "commercial" competition.

The operation of a public school system and certain types of public hospitals has three attributes which, together, remove it from any legitimate definition of "commerce". Such a system is (1) free, and therefore nonprofit; (2) purely governmental; and (3) so marginal, in an economic sense, that there could never be a nongovernmental system to compete with or substitute for it.

The Appellants are aware of no instance in which an activity having all three of those attributes has been held to be "commerce", and the Appellees have cited none. In response, Appellees, and a majority of the court below, pointed to a number of decisions to the effect that "commerce", as used in Article I, Section 8 of the Constitution, includes activities which may be nonprofit, or even non-"commercial".[4] An examination of these decisions, however, show that they are not really in point.

Edwards v. California (1941), 314 U.S. 160, held that the transportation or traveling of persons across State lines constitutes commerce and that a State could not burden or obstruct it by prohibiting the transportation of indigents from other States. *Caminetti v. United States* (1917), 242 U.S. 470, held the transportation of women interstate for purposes of prostitution to be commerce and, therefore,

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[4] The cases referred to by Judge Winter in this regard were *Edwards v. People of State of California*, 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119 (1941); *Thornton v. United States*, 271 U.S. 414, 46 S. Ct. 585, 70 L. Ed. 1013 (1926); *Caminetti v. United States*, 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917); *Brooks v. United States*, 267 U.S. 432, 45 S. Ct. 345, 69 L. Ed. 699 (1925); *United States v. Hill*, 248 U.S. 420, 39 S. Ct. 143, 63 L. Ed. 337 (1919); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. at pp. 256-257, 85 S. Ct. at p. 357.

regulable by Congress. *Brooks v. United States* (1925), 267 U.S. 432, declared the interstate transportation of stolen motor vehicles to be commerce, subject to Congressional control. *Thornton v. United States* (1926), 271 U.S. 414, sustained a conviction for assaulting an employee of the federal Bureau of Animal Industry, in the course of which it was held that the movement of cattle across State lines constituted commerce which Congress could regulate. *United States v. Hill* (1919), 248 U.S. 420, sustained a conviction under the Webb-Kenyon Act for transporting liquor from a "wet" State to a "dry" State, in violation of the latter's laws. The Court held it immaterial that the liquor in question was for the defendant's own consumption and not for resale on the theory that "commerce has been held to include the transportation of persons and property no less than the purchase, sale and exchange of commodities". 248 U.S. at page 423.

These cases all involved objects of commerce moving across State lines, and it was the movement of the objects which was being regulated. They are in no way akin to the attempted regulation here. The cases of *Powell v. United States Cartridge Co.* (1950), 339 U.S. 497; *Mitchell v. Lublin, McGaughy & Assoc.* (1959), 358 U.S. 207; *Mitchell v. Pilgrim Holiness Church Corp.* (7th Cir., 1954), 210 F. 2d 879; and *N.L.R.B. v. Central Disp. & E. Hosp.* (D.C., 1945), 145 F. 2d 852, relied on by Judge Winter, did not involve State or local governmental institutions and are not, therefore, in point. These cases merely hold that the existence of a profit motive is not necessary for an activity to constitute commerce. The other two characteristics present here were lacking.

Neither does *Public Building Authority of Birmingham v. Goldberg* (5th Cir., 1962), 298 F. 2d 367, lend any sub-

stantial support. In that case, the question was whether maintenance personnel employed by a private corporation which was under contract with a municipal authority to manage a building leased in part to the Social Security Administration were covered under the Fair Labor Standards Act. The Court had no difficulty in finding that the employees were not engaged in commerce, or in the production of goods for commerce. The government contended, however, that the federal employees working in the building were engaged in the production of goods for commerce, and that the maintenance personnel were therefore engaged in a "closely related process or occupation directly essential" to such production. The Court, in considering this approach, stated, at page 370:

> ". . . It just seems somewhat difficult to grasp the concept of a Government employee working on a Social Security Claim as producing goods for commerce. This is partially because the concept of 'producing goods' must be stretched to the outermost to include preparation and working on documents and partially because commerce generally has a connotation of business or profit. . . ."

Nevertheless, because "the courts have held that what these Government employees do would, if done in industry, amount to 'production of goods for commerce' ", the Court was constrained to hold that they too were so engaged. Accordingly, the maintenance employees were held to be covered because of their vicarious connection with commerce.

There are certain very real distinctions to be raised between the *Public Building Authority* case and the case at bar. In the first place, the Social Security employees were not sought to be covered under the Act, and no issue was raised as to whether they (or, more particularly, their

counterparts in State service) could constitutionally be covered. The case did not answer the question of whether State and local government employees could be subjected to federal regulation. Second, even as to the government employees themselves, their duties were far different than the duties of the employees affected here. Their job was to accept and process applications from and mail checks to persons residing out of the State. They performed no local function whatever. Nearly everything they did was for the ultimate purpose of sending money out-of-State — money which would be spent by its recipients for goods and services. The direct effect on interstate commerce is quite clear. If the maintenance people stopped working, the building may have been closed, the checks would not get out, and interstate commerce would have been burdened.

In short, by no legitimate test has the employment relationship of public school and hospital personnel been shown to have a substantial effect on commerce, whether by the illusion of competing with private institutions or by purchasing goods and services from out-of-State. These are functions of government and have no more than a remote and incidental effect on commerce as do all functions of government.

C. Even If the Operation of Public Schools and Hospitals Affects Commerce, They Are Not Subject to the Type of Regulation Imposed by the Fair Labor Standards Act.

As previously noted, Appellants do not contend that the public schools and hospitals are immune from all federal regulation. The Fourteenth Amendment has authorized certain guidelines to which they must conform and which have, on occasion, been federally enforced. But a distinc-

tion must be made between various types of regulations. If the regulation, though on its face directed solely at particular institutions, such as schools and hospitals, actually transcends them and strikes at the heart of State government, the question is no longer whether these institutions can be regulated, but whether the State government can be regulated.

Moreover, if the power to regulate schools and hospitals can be found merely because their operations affect commerce, then it cannot be denied that every other agency of State government which similarly affects commerce is also as regulable. Judge Winter, below, dismissed this concept as conjuring up nonexistent ghosts and limited his consideration of the question solely to the facts at hand. But it is not just what Congress has actually done which is at issue, but the Constitutional power to do it. As Justice Frankfurter stated in dissent in *West Va. State Bd. of Educ. v. Barnette* (1943), 319 U.S. 624, 660, the case is not dissociated from the past nor unrelated to the future. The effects of the Court's decision on possible related issues can be considered, as they were in *Zorach v. Clauson* (1952), 343 U.S. 306, 312, 313. The argument here is that the "effect" test has certain implied limits — that Congress can no more regulate a school janitor's salary than it can the Governor's, because the legal principle is the same. The Appellees' contention that the janitor's salary can be regulated because the school which employs him purchases goods and services from out-of-State necessarily requires them to admit that Congress may also regulate the wages and hours of the Governor, the judges, members of the State legislature, the Attorney General, the district attorneys and, in fact, the members and employees of all State and local boards and agencies, whenever it appears that such agencies or officials buy goods and services from out-

of-State. It was stipulated below that nearly all, if not all, of these officials and agencies do, in fact, make such purchases so that they too affect commerce.

If this admission is made — as by the force of logic it must be — then the true scope or depth of the issue can be seen. We are talking about relative power and sovereignty; Appellants will seek to demonstrate that the type of interference or intrusion involved here was never authorized by the framers of the Constitution, or the States which ratified it, and that it has never been approved by any decision of this Court. In this context, the scope of and limits to federal power can be examined.

1. *The Commerce Power and Federalism — Original Intent.*

The journals of the Constitutional Convention of 1787 and the ratifying conventions in the various States, as well as the letters and documents of the principal actors of the time, reveal two very clear and definite facts: (1) in granting to Congress the power to regulate commerce, the States never intended that such power, either negatively or affirmatively, could or would be used to circumscribe their exclusive authority over local matters; and (2) no power delegated to the national government could authorize that government to interfere with the operation of State government.

The late Justice Felix Frankfurter wrote in 1937 that[5]

> "The records [of the Convention and State ratifying Conventions] disclose no constructive criticism by the States of the commerce clause as proposed to them. . . . The conception that the mere grant of the commerce power to Congress dislodged state power finds no ex-

[5] Felix Frankfurter, *The Commerce Clause under Marshall, Taney and Waite,* Univ. of North Carolina Press (1937), pp. 12, 13.

> pression. At least the negative evidence permits the inference that the commerce clause was a sword available for Congressional use; it was an authorization to remove those commercial obstructions and harassments to which the militant new free states subjected one another, and to enable the community of the states to present a united front to the world."

This point of view was reflected by James Madison in Federalist No. 45, where he stated that[6]

> "The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained."

That the purpose of the new power was to curb the trade barriers erected by the States against each other and not to permit regulation of their own governments was also expressed by Madison in Federalist No. 42.

The Frankfurter view finds support also in the writings of Joseph Story, who stated:[7]

> "In the convention there does not appear to have been any considerable (if, indeed, there was any) opposition to the grant of the power. It was reported in the first draft of the constitution exactly as it now stands, except that the words, 'and with the Indian tribes' were afterwards added, and it passed without a division."

Aside from the commentaries of Justice Frankfurter, it is a logically compelling conclusion that, in view of the concept of State sovereignty then prevalent, this grant of power was directed at a single purpose only — to end the commercial rivalries between the States and present a united commercial front to the rest of the world. The very

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[6] James Madison, *The Federalist*, No. 45, published by R. Wilson Desilver (1847), p. 185.

[7] Joseph Story, *Commentaries on the Constitution of the United States*, Vol. II (1833), § 1054, p. 505.

absence of substantial objection to it, under the circumstances of the times, indicates rather clearly that it was never thought to be a weapon which could be used *against* the States; it was intended to strengthen them.

The second fact which emerges from the various documents — that the States, as politically autonomous units, were to be a major participant in the new system, and that no power delegated to the national government could be used to encroach upon their area of authority — finds expression in many ways. The Constitution itself bears witness to it.

The States — as States — chose the President (and still do) as well as the Senators. The State legislatures also played an important, if not dominant, role in choosing Congressmen in the House of Representatives, although this political fact was not given constitutional recognition. The times, places and manner of electing the federal legislators is, by Article I, Section 4, to be determined by the States. The territorial integrity of the States was guaranteed by Article IV, Section 3, and their participation in the amending process required by Article V.

The Federalist papers are replete with assurances that State autonomy would not be disturbed under the new constitution; in fact, the States were to be the bulwark against federal power generally. Even the nationalist Hamilton declared in Federalist No. 28:[8]

> "It may safely be received as an axiom in our political system, that the State Governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the National authority."

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[8] Alexander Hamilton, *The Federalist,* No. 28, published by R. Wilson Desilver (1847), p. 107.

Madison, in Federalist No. 45, pointed out that "the State Governments may be regarded as constituent and essential parts of the Federal Government; whilst the latter is nowise essential to the operation or organization of the former."[9] Continuing, he described the powers of the two sovereignties as follows:[10]

> "The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State."

With particular relevance to the issue in the proceeding at bar, Hamilton, in Federalist No. 32, dismissed the idea that the national government could control or interfere with the free and unfettered power of State taxation, stating:[11]

> ". . . I am willing here to allow, in its full extent, the justness of the reasoning, which requires, that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm, that (with the sole exception of duties on imports and exports) they would, under the plan of the Convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the National Government to abridge them in the exercise of it, would be a violent assumption of

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[9] *Op. cit.*, n. 6, p. 186.
[10] *Op. cit.*, n. 6, p. 187.
[11] *Op. cit.*, n. 8, No. 32, p. 119.

power, unwarranted by any article or clause of its Constitution."

Although, as Justice Frankfurter noted, there was little or no opposition to the delegation of the commerce power on the various ratifying conventions, there was a good deal of concern over the continued effectiveness of State government, and the degree of control over it which the national government may be authorized to exercise. The concern was in each case allayed by assurances such as those expressed by Hamilton and Madison.[12] Notwithstanding these assurances, however, several of the States ratified the Constitution only upon the condition that certain amendments would immediately be made, one of which would confirm the understanding that the powers not delegated to the national government were reserved to the States, free from national interference,

In the first Congress assembled under the Constitution, Madison's committee proposed a series of amendments, the last of which became the Tenth Amendment.

The Tenth Amendment, it may be conceded, added nothing specifically to the Constitution; it neither enlarged nor restricted any particular State or national power. *United States v. Sprague* (1931), 282 U.S. 716. It did, however, confirm the understanding that the newly-created government was one of specific powers, and that all other power was reserved to the States or the people. It presupposed that such reserved powers were inviolate and could not

[12] See, for example, the Bodman-Sedgwick discussion in Massachusetts, reported in *The Debates in the Several State Conventions on the Adoption of the Federal Constitution,* Jonathan Elliott (1836), Vol. II, p. 60; Governor Huntington's comments in Connecticut, reported at page 199 of the same volume; Alexander Hamilton's Comments in New York, reported at page 353 of said volume; comments of James Wilson in Pennsylvania, reported at page 459 of said volume.

be usurped by the national government, in accordance with the many assurances of the federalists, as noted above. See *Hopkins Fed. S. & L. Asso. v. Cleary* (1935), 296 U.S. 315, 337.

Thus, in ratifying the Constitution, the original States accepted Congressional control over commerce (although there perhaps was no agreement on just what constituted commerce) but they certainly did not accept Congressional control over the scope and affairs of their own governments. All of the relevant literature indicates most strongly that the States were not at all disposed to create a national government which could, under any of its powers, interfere with the operation of State government, and that they did not, in fact, do so.

2. *The Commerce Power Generally — Judicial Construction*

From the time of the Marshall Court until the late 1880s, or even into the mid-1930s, the conflict between the commerce power and State autonomy arose in the context of which level of government would have the ultimate control over various external (i.e., nongovernmental) economic matters, or, conversely, the extent to which the States could pass laws which tended to hinder or obstruct the free flow of commerce. In most of the cases during this period, it was the validity of State, rather than federal, laws which was at issue.[13]

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[13] See, for example, Louis H. Pollak, *The Constitution and the Supreme Court* (1966), World Publishing Co., Vol. I, pp. 230, *et seq.*; *The Constitution of the United States of America*, prepared by the Legislative Reference Service of the Library of Congress, 88th Congress, Document No. 39 (1964), p. 150; Felix Frankfurter, *The Commerce Clause under Marshall, Taney and Waite*, *op. cit.*, n. 5, p. 7; *Wickard v. Filburn* (1942), 317 U.S. 111.

It had never seriously been disputed that, if a State regulation of commerce were in conflict with a valid federal regulation, the latter would control. The question in the early cases was whether the States could regulate commerce in the absence of a federal regulation; in other words, was the Congressional power so exclusive as, of itself, and without an actual exercise of it, to preclude State action? The cases fall into three definable patterns: (1) those where a State regulation of commerce was tested against the federal commerce power;[14] (2) those where a State tax or revenue measure was tested against the commerce power;[15] and (3) those where a State regulation of commerce was tested against other constitutional provisions.[16]

The factual situations in these cases, and the shifts in philosophy by the Court, need not be recounted here.[17] Their relevance to the case at bar is in the three interlocking concepts which arose from them; namely, (1) that the commerce power is plenary and broad and, in situations

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[14] See, for example, *Gibbons v. Ogden* (1824), 9 Wheat. 1; *Wilson v. Black Bird Creek Marsh Co.* (1829), 2 Pet. 245; *Cooley v. Board of Wardens* (1851), 12 How. 299; *Hall v. DeCuir* (1877), 95 U.S. 485; *Morgan v. Commonwealth of Virginia* (1946), 328 U.S. 373; *Bob-Lo Excursion Co. v. Michigan* (1948), 333 U.S. 28; *Southern Pacific Co. v. Arizona* (1945), 325 U.S. 761.

[15] *M'Culloch v. Maryland* (1819), 4 Wheat. 316; *Brown v. Maryland* (1827), 12 Wheat. 419; *Woodruff v. Parham* (1869), 8 Wall. 123; *The License Cases* (1847), 5 How. 504; *The Passenger Cases* (1849), 7 How. 283.

[16] See *The Slaughterhouse Cases* (1873), 16 Wall. 36; *Lochner v. New York* (1905), 198 U.S. 45; *Muller v. Oregon* (1908), 208 U.S. 412; *Adkins v. Children's Hospital* (1923), 261 U.S. 525; *Morehead v. New York* (1936), 298 U.S. 587; *West Coast Hotel Co. v. Parrish* (1937), 300 U.S. 379. It is noted that this line of cases begins later than the other two primarily because the other provision of the Constitution against which the State regulation was tested was largely the Fourteenth Amendment, which did not take effect until 1868.

[17] They are summarized in Frankfurter, *op. cit.*, n. 5, and Pollak, *op. cit.*, n. 10.

where national uniformity is required, also exclusive; but (2) that it is not unlimited, there being some activities which are beyond its reach; and (3) that implicit in our Constitutional scheme is the maintenance of strong and effective State governments. Many passages from these opinions could be quoted to support each of the three propositions. *Gibbons v. Ogden* (1824), 9 Wheat. 1, best sustains the first concept. The other two, equally important, were summarized best by Justice McLean in *Pierce v. State of New Hampshire* (1847), 5 How. 504, 588 (one of the *License Cases*), when he stated:

> "The States, resting upon their original basis of sovereignty, subject only to the exceptions stated, exercise their powers over everything connected with their social and internal conditions. A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. They appertain to the State sovereignty so exclusively as powers delegated appertain to the general government."

Continuing, at page 592, he noted that what has not been delegated to Congress (in terms of commerce) remains with the States:

> ". . . every reason which leads to this result, applies with still greater force to the internal polity of a State, over which there is no pretense of any jurisdiction by Congress. No subtlety of reasoning, no refinement of construction, or ingenuity of supposition, can make commerce embrace police or pauperism, which would not, by parity of reasoning, include the whole code of State legislation. . . ."

Starting with the Interstate Commerce Act in 1887, Congress began to exercise its power under the Commerce

Clause in a more affirmative fashion, and the cases coming before the Court began more and more to involve the degree to which positive Congressional action was authorized rather than the extent to which State action was unauthorized. The early cases arising in this context indicated that the plenary power was not really so plenary.[18] These decisions did not rest on the basis that Congress could not regulate commerce, but rather that either (1) the activities to be regulated were not commerce, or (2) the power to regulate commerce was itself subject to other Constitutional limitations (such as the prohibition against laws impairing the obligation of contracts).

In 1936, the philosophy behind the earlier restrictive decisions changed, and the Court began to apply the broad concepts enunciated by John Marshall in the context of State actions to the positive programs of Congress. It is partly from these decisions that Appellees (and certainly Judge Winter below) draw support for their position, so careful consideration must be given to them. The cases, as noted by Judge Thomsen in his concurring opinion below, fall into two categories; namely, "those in which the regulation was being applied to and challenged by a party other than a State or a political subdivision, and those in which the regulation was being applied to and challenged by a State itself or by a political subdivision of a State" 269 F. Supp. at page 847.

Because these later cases involved, or required, a redefinition of the commerce power and what activities it

[18] See *United States v. E. C. Knight Co.* (1895), 156 U.S. 1; *Hammer v. Dagenhart* (1918), 247 U.S. 251; *Adair v. United States* (1908), 208 U.S. 161; *Panama Refining Co. v. Ryan* (1935), 293 U.S. 388; *Railroad Retirement Board v. Alton Railroad Co.* (1935), 295 U.S. 330; *A. L. A. Schechter Poultry Corp. v. United States* (1935), 295 U.S. 495; *United States v. Butler* (1936), 297 U.S. 1; *Carter v. Carter Coal Co.* (1936), 298 U.S. 238.

could reach in the face of the earlier decisions, some very broad and general language was used which Appellees have lifted and made applicable to the case at bar. In this connection, it is important to recall the self-restraint imposed by Chief Justice Taney in the *License Cases, supra,* 5 How. 504, when he stated, at page 573:

> "It is not my purpose to enter into a particular examination of the various passages in different opinions of the court, or of some of its members, in former cases, which have been referred to by counsel, and relied upon as supporting the construction of the Constitution for which they are respectfully contending. And I am the less inclined to do so because I think these controversies often arise from looking to detached passages in the opinions, where general expressions are sometimes used, which, taken by themselves, are susceptible of a construction that the court never intended should be given to them, and which in some instances would render different portions of the opinion inconsistent with each other. It is only by looking to the case under consideration at the time and taking the whole opinion together, in all its bearings, that we can correctly understand the judgment of the court."

The same concept was restated in *Gomillion v. Lightfoot* (1960), 364 U.S. 339, 343, as an admonition that:

> "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretative process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts. . . ."

In this light, the cases can be considered.

(a) *Cases Involving Private Parties.*

The first category of cases, as noted, involved an attempted regulation of nongovernmental parties by Congress, the challenge usually being that the activity involved

did not constitute commerce, or that it was subject to regulation, if at all, only by the States. The "sovereignty" of the States was vicariously interposed, not in order to preserve some essential *governmental* function, but only to elude federal regulation of a private economic activity.

N.L.R.B. v. Jones & Laughlin Steel Corp., supra, 301 U.S. 1; *United States v. Darby, supra,* 312 U.S. 100; *United States v. Wrightwood Dairy Co.* (1942), 315 U.S. 110; *Wickard v. Filburn, supra,* 317 U.S. 111; *Heart of Atlanta Motel v. United States* (1964), 379 U.S. 241; *Katzenbach v. McClung* (1964), 379 U.S. 294, are examples of such cases.

In *Jones & Laughlin,* the National Labor Relations Act was challenged "as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns". 301 U.S. at page 29. The Court answered this contention by recognizing that the Act limited the federal reach to those activities which burdened or obstructed commerce or the free flow of commerce. As to the argument that the plant in question was engaged in manufacturing, which was purely local and did not of itself constitute commerce, the Court noted, at 301 U.S., page 37:

> ". . . Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. . . ."

The Court was careful, however, to place some boundaries on the newly-interpreted power. Continuing, it said:

> ". . . Undoubtedly, the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects

upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree. . . ."

In the particular case, the Court refused to shut its eyes to the plain facts of economic life. However local an operation may be in and of itself, labor unrest in a company like Jones & Laughlin could and would have a direct and serious effect on interstate commerce, and, because of this, the phases of the employment relationship which were most likely to cause such unrest were subject to Congressional regulation.

The basis of the original Fair Labor Standards Act, which led to *United States v. Darby, supra,* 312 U.S. 100, has already been noted. *Darby* involved a restatement and slight extension of the principles announced in *Jones & Laughlin.* Three central issues were raised; namely, (1) did manufacturing for shipment in interstate commerce itself constitute commerce, especially where part of the goods so manufactured may not find their way into interstate commerce; (2) if so, did the Congressional regulatory power extend to prohibiting the shipment of goods in commerce; and (3) did the fact that the federal government was moving into an area theretofore subject to regulation only by the States constitute a violation of the Tenth Amendment?

The Court answered the first question by holding that, although manufacturing itself was not commerce, "the shipment of manufactured goods interstate is such commerce" which Congress may regulate; 312 U.S. 113. With respect to the argument that some goods may not find their way into interstate commerce and, to that extent, both

their manufacture and distribution constitute only intrastate commerce, the Court held that the Congressional power "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce". 312 U.S. 118. This was simply a rewording of the old "effect" test which had its origins in *M'Culloch v. Maryland* (1819), 4 Wheat. 316, 421.

The third challenge, that the federal regulations contravened the Tenth Amendment, was put to rest with the statement that "it is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states". 312 U.S. 114. It was in this context that the Court stated that the Amendment was but a truism — that all which has not been granted is reserved. But, as noted, and as must be kept in mind with respect to this series of cases, no reserved power of the State was, in point of fact, being infringed upon. An area of commerce previously subject only to State regulation (and not effective regulation at that, particularly as a result of *Hammer v. Dagenhart,* 247 U.S. 251) was now being made subject to federal regulation as well. Nothing was being removed from State government, and no outside control over *it* was being exercised.

United States v. Wrightwood Dairy Co., supra, 315 U.S. 110, followed the pattern of *Jones & Laughlin* and *Darby* and led the way to *Wickard v. Filburn, supra,* 317 U.S. 111.

The *Wrightwood* case, previously discussed *infra* at page 19, does not constitute any marked extension of the commerce power. It acknowledged only that, where there was substantial competition between a local and interstate

form of commerce, the former could be regulated if it affected the latter. This concept was restated in *Wickard v. Filburn, supra,* 317 U.S. 111, which held that homegrown wheat, intended to be used solely by its planter for his own domestic purposes, was subject to the Secretary of Agriculture's quota allotments because such wheat was in competition with other wheat shipped in interstate commerce, and thereby affected the market price of the commodity. In both *Wrightwood* and *Wickard* the Court cited the broad language of Chief Justice Marshall in *Gibbons v. Ogden* as authority for the extension of the commerce power over activities local in nature which substantially affect interstate commerce. But, in all of these cases, the activity to be regulated was commerce, not government; and the language employed to justify or explain the specific conclusions of the Court cannot be lifted out of that context.

The two "civil rights" cases — *Heart of Atlanta Motel, Inc. v. United States, supra,* 379 U.S. 241, and *Katzenbach v. McClung, supra,* 379 U.S. 294 — relied upon by Appellees below as well as by Judge Winter, are of the same effect. In *Heart of Atlanta,* wherein the Public Accommodations sections of the Civil Rights Act of 1964 were upheld, the Court stated:

> ". . . While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. . . ." (p. 252).
>
> ". . . . We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel" (p. 253).

Upon these findings, the Court then considered the application of the commerce power. After liberally quoting from *Gibbons v. Ogden, supra,* the Court held, with ample

authority, that interstate travel constitutes commerce which Congress can regulate. As to the argument that hotels and motels were local in character, the Court said:

> ". . . It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, 'if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' [Citations.]
>
> ". . . Thus the power of Congress to promote interstate commerce also includes the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may — as it has — prohibit racial discrimination by motels serving travelers, however 'local' their operations may appear."

The holding with respect to the commerce power in *Heart of Atlanta* was carefully related to the factual evidence in the case, and that evidence clearly demonstrated that racial discrimination placed a substantial burden on interstate commerce. The same situation existed in *Katzenbach v. McClung, supra,* 379 U.S. 294, wherein the application of the Public Accommodations sections of the Civil Rights Act of 1964 to certain restaurants was sustained. There, also, the Court found that:

> ". . . The record is replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants. . . ." (p. 299).
>
> ". . . In addition, there were many references to discriminatory situations causing wide unrest and having a depressant effect on general business conditions in the respective communities. . . ." (p. 300).
>
> "Moreover there was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes. . . ."

The Court concluded from these facts that:

> ". . . established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it. . . ."

Upon these conclusions, the Court then stated that, where the exercise of the commerce power, "keeps within its sphere and violates no express constitutional limitation", the Court would not interfere.

The cases in this first category establish the proposition that the commerce power authorizes the regulation of those activities which have a substantial effect on interstate commerce. They serve as no authority for the propositions advanced by Appellees and accepted by Judge Winter and, to a certain extent, by Judge Thomsen, that anything at all which affects commerce may be regulated, or that the maintenance of effective State government is not an implied limitation on the commerce power.

In each case, and in the cases referred to in Part B hereof, *supra,* at pages 24 and 25, the activity regulated either moved itself in interstate commerce or, absent the regulation, could be expected to burden or obstruct interstate commerce. In *Jones & Laughlin,* the Court reiterated the fact, expressed many times before, that there were activities which may have an indirect and remote effect on commerce, but which were beyond the scope of Congressional power. The maintenance of our federal system was an implied limitation. See 301 U.S. at page 37, quoted *supra,* at page 39 hereof. No case since *Jones & Laughlin* has overturned this principle. It was, in fact, reaffirmed in *Polish Nat. Alliance v. N.L.R.B.* (1944), 322 U.S. 643, where the Court, though sustaining the application of the National Labor Relations Act to insurance companies,

noted with respect to the federal-state relationship, at page 650:

> "The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. *Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity.*" (Emphasis supplied.)

It is especially important to note also the context in which the Tenth Amendment arguments were rejected in these cases. The concern expressed by the States during the 1787 Convention and during the various ratifying conventions which led to the Tenth Amendment was not that the federal government would exercise dominion over private commercial activity. As previously noted, the commerce power was granted without substantial opposition in order to permit such regulation. The States were not afraid of sharing their own regulatory power over private enterprise. Their concern was that the new government might attempts to exercise dominion over *them* and to infringe upon their integrity as States — as semiautonomous political entities; and that was the reason for the Tenth Amendment.

Accordingly, the interposition of State sovereignty and the Tenth Amendment by private groups to elude federal regulation involved a misapplication of both the doctrine and the Amendment; and its rejection by the Court did not lessen their true and intended existence and effect. No reserved power of the States was being denied in any of these cases.

(b) *Cases Involving States and State Agencies.*

In contrast to the above cases, there have been several decisions of this Court wherein the regulation of an eco-

nomic activity by Congress has been held applicable to States and State agencies to the extent that they may engage in the activity. Appellees relied very heavily in the court below on these decisions to sustain Public Law 86-601. Appellants maintain that these decisions do not justify that conclusion and, in fact, the reasoning behind them (as opposed to the *dicta* in them) indicate that Congress does not have the power it has presumed to exercise here.

The cases within this second category tend to fall into three subgroups: (1) the application of commercial regulations to State agencies engaging in purely commercial activities; (2) the supremacy of federal power appropriately exercised over a conflicting State interest; and (3) the extent of State immunity from direct federal regulation.

The cases of *United States v. California* (1936), 297 U.S. 175; *California v. Taylor* (1957), 353 U.S. 553; and *Parden v. Terminal R. Co.* (1964), 377 U.S. 184, are characteristic of the first subgroup and may be considered together.

The two California cases concerned the State-owned Belt Railroad. This was a line owned and operated by the State which paralleled the San Francisco waterfront. It extended to forty-five wharves and directly served 175 industrial plants. It had track connections with one interstate railroad and linked three other interstate lines with freight yards in San Francisco. The larger part of the traffic carried on the railroad had its origin or destination outside of California.

The first case in time (*United States v. California*, 297 U.S. 175) involved the question of whether the State, in its operation of this railroad, was subject to the Federal Safety Appliance Act. After reviewing the above facts, the Court concluded that "all the essential elements of interstate rail transportation are present in the service rendered by the State Belt Railroad".

The issue was whether the State could be subjected to the Act because it was a State. Granting that California had the power to operate the railroad (and dismissing the distinction as to whether its operation was in a "sovereign" or "proprietary" capacity), the Court held that "California, by engaging in interstate commerce by rail, has *subjected itself* to the commerce power, and is liable for a violation of the Safety Appliance Act" (emphasis supplied). The Court used very broad language in describing the commerce power, but always in the context that the activity in question was, in fact, commerce to which the power was applicable in the first instance.

The second case (*California v. Taylor*, 353 U.S. 553) was similar. The question there was whether the State, in its operation of the Belt Railroad, was subject to the Railway Labor Act. From the facts developed in the previous case, the Court concluded that "it is a common carrier engaged in interstate commerce and files tariffs with the Interstate Commerce Commission". The Court noted one additional point of considerable significance, that the whole employment relationship (promotions, layoffs, dismissals, rates of pay, and overtime) "differed from their counterparts under the state civil service laws". The railroad had observed and followed the Railway Labor Act on its own for a number of years.

The Court described in some detail the history of the Act — how the railroad industry had to be treated as a whole and apart from other industries because of its peculiarities. It also mentioned, as was perfectly obvious, that labor disputes in the Belt Railroad could very directly and seriously affect interstate commerce. Accordingly, on the same theory adopted in the earlier case, the Court held that:

> ". . . If California, by engaging in interstate commerce by rail, subjects itself to the commerce power

> so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships."

Once again, there could be no question but that the affected activity was, itself, commerce.

Parden v. Terminal R. Co., 377 U.S. 184, involved a similar factual situation. The question there was whether a railroad owned by the State of Alabama was subject to the Federal Employers' Liability Act. The railroad ran near the docks at Mobile, served several industries, operated an interchange with private railroad companies, and performed its services "for profit under statutory authority authorizing it to operate 'as though it were an ordinary common carrier' ". The Court concluded from the evidence that "it is thus indisputably a common carrier by railroad engaging in interstate commerce" (p. 185).

The argument by Alabama was that the suit could not be maintained under the Eleventh Amendment — not that Congress had exceeded its power under Article I, Section 8. The Court held that, although the Eleventh Amendment was applicable and ordinarily would have barred the suit, Alabama waived its right to object to the suit by operating the railroad. At page 192, the Court stated:

> ". . . Our conclusion is simply that Alabama when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act."

That is all the *Parden* case holds.

Akin to the railroad cases is *California v. United States* (1944), 320 U.S. 577, wherein the federal Shipping Act of 1916 was held applicable to waterfront terminal operations conducted by the State of California and the City of Oakland. The Court found as a fact that:

"... In thus providing facilities for waterborne traffic, Oakland and California have for many years competed with privately owned terminals in San Francisco Bay. Cut-throat competition ensued, with the inevitable chaos following abnormally low rates" (p. 580).

The power of Congress to regulate this type of activity was assumed from *United States v. California, supra,* 297 U.S. 175, the case concerning the Belt Railroad (p. 586).

These four cases each involved a situation where a State engaged in a purely commercial activity — usually in competition with private, profit-making enterprise which was not a necessary State function. The activity was not an integral part of State government, and, if the State withdrew from the activity, private industry would immediately move in. The citizenry would be generally unaffected. More importantly, however, *in not one of these cases was there any showing that the federal regulation would substantially interfere with the essential sovereignty of the State.* In each case the Court merely said that, if the State wished to engage in such a commercial and, from a governmental point of view, nonessential activity, it would have to conform its laws to meet the overriding federal statutes. In none of these was a State forced to scrap its constitutional budgetary system, to impose additional taxes to meet Congressional regulations, or to withdraw or restrict an activity, such as public education or hospitals, which it alone could perform.

The State of California claimed in the first railroad case (*United States v. California, supra,* 297 U.S. 175) that the operation of the railroad was a sovereign act of the State. The Court agreed that it might be so, on the theory that the State did have the power to run the railroad. In that sense it was an exercise of sovereignty. But, in the broad political sense — in the sense of the nature of our federal

system, and the degree of political integrity possessed by the States — the question of State sovereignty was not really in issue. None of these cases involved the question of whether (1) a function containing the three elements mentioned above (i.e., nonprofit, purely governmental and so marginal as to preclude effective competition) could be regulated and (2) regulated in a way that destroyed the fiscal independence and integrity of the States. The instant case involves exactly this question, and the railroad-dock cases serve as no real precedent. They serve only to point up the distinction.

In a footnote to his Opinion, Judge Winter made reference to *United States v. Feaster* (5th Cir., 1964), 330 F. 2d 671; *State of Colorado v. United States* (10th Cir., 1954), 219 F. 2d 474; and *N.L.R.B. v. Local 254, Building Service Employees* (1st Cir., 1967), 376 F. 2d 131, as further supporting the proposition that State activities could be regulated. These cases add nothing to the principles, and limitations, announced in the California cases. *United States v. Feaster* involved the Alabama Docks Department, the same agency involved in *Parden v. Terminal R. Co., supra*, 377 U.S. 184. The issue was whether an injunction should issue to restrain the agency's officials from barring access of the National Mediation Board to certain books and records. No question was raised as to the power of Congress to extend the Railway Labor Act to the State-owned docks and terminals, the case turning on other issues. To the extent that the question was implicit in the case, it was determined in the same context as *Parden;* i.e., an admittedly commercial activity, substantially affecting interstate commerce, which was not an indispensable State function.

The *Colorado* case is similar. There, the Court held that, if the State wished to engage in brand inspection activities at the stockyards, it would have to do so pursuant to the

Packers and Stockyards Act of 1921. The rationale of the decision was very close to that of *Parden* — if the State desired to enter into an activity (which was in no way an essential governmental function) which affected commerce and which was already subject to Congressional regulation, then, by doing so, it voluntarily diminished its sovereignty. See 219 F. 2d at page 477. This is different from the situation at hand, both in type and effect on the State.

The third case — *N.L.R.B. v. Local 254, Building Service Employees,* 376 F. 2d 131 — is not at all in point. The question there was whether secondary picketing by employees of a window washing firm constituted an unfair labor practice. One of the employer's customers who was picketed was the Massachusetts Department of Education, which was held to be a "person engaged in commerce" for purposes of declaring the picketing unlawful. No Congressional regulation was being applied against the Department, and there was no suggestion in the case that the engagement in commerce was of a type sufficient to subject the Department to any such regulation.

In short, the cases in this first category did not involve an interference with State budgetary processes, or a financial burden to the States, or subject to regulation an activity which was nonprofit, purely governmental, and free from substantial competition.

Judge Winter referred to *United States v. Ohio* (1966), 385 U.S. 9, as permitting federal regulation of such a function. The question there was whether the quota allotments under the Agricultural Adjustment Act were applicable to wheat grown on State penal farms. In the District Court, the State questioned the constitutional power of Congress to apply the quotas to State farms without success. The Court of Appeals for the Sixth Circuit re-

versed on the basis of statutory construction. 354 F.2d 549. The constitutional question was not raised by the State or discussed by the Court. On certiorari, this Court reversed the Court of Appeals without opinion, simply citing *Wickard v. Filburn*, 317 U.S. 111. The State did not raise the constitutional issue before this Court, and it would appear that the disagreement between this Court and the District Court, on the one hand, and the Court of Appeals, on the other, was over a matter of statutory construction.

Even if the constitutional question was impliedly considered, the case is still distinguishable, having much the same posture as the railroad and dock cases. Judge Winter apparently analogized the operation of penal farms with that of public schools and hospitals and concluded that, if, under the *Ohio* case, the former was subject to regulation, then so was the latter. But that is not the proper analogy. What was subject to regulation was the growing of wheat, which was in no way essential to the operation of the Ohio penal system, but which, under the *Wickard* doctrine, had a substantial effect on interstate commerce.

The regulation involved here is far more direct. The schools and hospitals cannot operate without the people covered under Public Law 89-601, and the effect of their coverage is, as noted, not only to increase substantially the cost of providing these services, but also to interfere with the most basic political processes of State government.

The second subgroup of cases, wherein a federal regulation, appropriately exercised, has been held to be superior to various types of State interests, is typified by *City of Tacoma v. Taxpayers* (1958), 357 U.S. 320; *Oklahoma v. Atkinson Co.* (1941), 313 U.S. 508; *Sanitary District v. United States* (1925), 266 U.S. 405; *Case v. Bowles* (1946), 327 U.S. 92; *Board of Trustees v. United States* (1933), 289

U.S. 48; *United States v. Oregon* (1961), 366 U.S. 643. *Cf. Ashton v. Cameron County* (1936), 298 U.S. 513; *Hopkins Fed. S. & L. Asso. v. Cleary, supra,* 296 U.S. 315.

The first three cases — *City of Tacoma, Oklahoma* and *Sanitary District* — were, like *Gibbons v. Ogden,* cases involving the Congressional power to regulate the navigable waterways. *City of Tacoma* was decided on the question of *res judicata,* but its effect was to hold that the City could, pursuant to a license from the Federal Power Commission, construct a hydroelectric project, although the reservoir thereby created would inundate a State-owned fish hatchery.

The *Oklahoma* case was very similar. There, the construction of a dam on the Red River, as part of a comprehensive flood control program, was authorized, although its effect would be to inundate land in Oklahoma, including land owned by the State. The question essentially concerned the extent of the federal power of eminent domain. The Court noted that the respective property owners would receive just compensation, and that there would be no loss of political jurisdiction by the State over the lands taken, except with its consent. The economic effect on the State from the taking (there being no serious or apparent political effect) was no bar to the power to condemn.

In *Sanitary District v. United States,* the Court sustained an injunction restraining the Chicago Sanitary District from diverting more than 250,000 cubic feet of water per minute from Lake Michigan. The government alleged that further diversions in excess of that amount would lower the water levels of four of the Great Lakes, five major rivers, and all the harbors connected therewith. All of these bodies of water were navigable, and the extra diversion "will thus create an obstruction to the navigable

capacity of said waters" and alter the condition and capacity of the harbors connected with them. 266 U.S. at page 424. The Sanitary District predicted dire results to the City of Chicago if the rate of diversion were reduced, which the Court felt were probably exaggerated. The Court viewed the case as the United States "asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction. It has a standing in this suit not only to remove obstruction to interstate and foreign commerce . . . but also to carry out treaty obligations to a foreign power . . .".

The *Sanitary District* case did no more than affirm the federal power of eminent domain exercised with respect to an obstruction to interstate commerce pursuant to the commerce power. That some damage will be suffered by the condemnee is to be assumed in every such case, but, as the Court noted, the fact of the resulting injury, in that instance, could not act as a defense to the power. At the risk of it becoming a cliché, however, the very basic distinction between the consequences of the injunction in that case, as well as the condemnations in *City of Tacoma v. Taxpayers, supra,* 357 U.S. 320, and *Oklahoma v. Atkinson Co., supra,* 313 U.S. 508, and of the Act in question here, must be recognized. The most that was involved in those cases was an interference with a particular State activity. There was no interference with State government itself — no tampering with or outside control over the budgetary and legislative appropriation process. It is not a question of comparing schools and hospitals to sanitation and saying that all three are on the same footing, because, as noted, it is not just schools and hospitals which are being regulated, but the fundamental political process of government itself.

Case v. Bowles, supra, 327 U.S. 92, involved a conflict between the war power and an activity in which a State, as

a sovereign entity, was otherwise permitted to engage, but which had to be subordinated to the superior federal power. The specific question was whether the regulations issued under the Emergency Price Control Act were applicable to the sale of timber by the State of Washington. Specifically, the issue was whether the sale, at a price in excess of the federal ceiling, but in accordance with the requirements of State law, could be enjoined.

The Court sustained the federal Act as an exercise of the war power. It then stated, at 327 U.S. 102:

> ". . . And our only question is whether the state's power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry on war. For reasons to which we have already adverted, an absence of federal power to fix maximum prices for state sales or to control rents charged by a state might result in depriving Congress of ability effectively to prevent the evil of inflation at which the Act was aimed. The result would be that the Constitutional grant of the power to make war would be inadequate to accomplish its full purpose. And this result would impair a prime purpose of the federal government's establishment.
>
> "To construe the Constitution as preventing this would be to read it as a self-defeating charter. . . ."

The Court viewed the issue as a conflict in sovereign powers — the federal power to wage war and the State's power to sell timber. The two were contradictory, and the recognition of one would necessarily detract from the other. Although the power to sell timber may have been an exercise of sovereignty, in the sense that the State was constitutionally authorized to make the sale, its subordination of that power to the superior federal power did not affect its sovereignty in the most basic sense, or threaten its existence as a semiautonomous political entity, as does Public Law 89-601.

This group of cases must be read in the context of their factual situation. If there are limits to the extent of federal power, then somewhere a line must be drawn. That line must be fixed with reference to the relative degrees of intrusion in each case. If broad language authorizing a relatively mild and nonbasic intrusion can be lifted out of its context and used to authorize a much more serious form of regulation, then no line can ever be drawn. Such a doctrine represents the antithesis of a viable constitutional system. The balance between the State and federal governments is far too delicate and important to be so treated. Accordingly, Appellants believe that these aforecited cases do not serve as authority for Public Law 89-601.

The third subgroup of cases in the category of federal-State conflicts involves the problem of direct federal regulation of State government or, conversely, the degree of immunity therefrom. This is the critical consideration involved here, and the reasoning of this Court in these cases is especially pertinent. The cases in this area have generally concerned the extent to which the federal government can tax States and State activities, and have been in the context of reciprocal immunity of each level of government from taxing by the other. The Appellants assert that the federal government cannot tax the governmental functions of a State because such taxation would permit the destruction of such functions; that the reasoning implicit in such a conclusion would be equally applicable to any power whose exercise could have the same effect; and that it is especially applicable to the commerce power.

The law with respect to State governmental tax immunity was adequately summarized in the four Opinions rendered in *New York v. United States* (1946), 326 U.S. 572. As indicated therein, the concept enunciated by Chief Justice Marshall in *M'Culloch v. Maryland, supra,* 4 Wheat.

316, 431, that the power to tax involves the power to destroy, led the Court initially to assume that there was nearly absolute reciprocal immunity on the part of each level of government from taxation by the other. See *Collector v. Day* (1871), 11 Wall. 113. Later, a distinction was recognized between governmental and proprietary activities, and the State's tax immunity was limited to the former. *South Carolina v. United States* (1905), 199 U.S. 437; *Helvering v. Gerhardt* (1938), 304 U.S. 405; *Allen v. Regents of University System* (1938), 304 U.S. 439. The decisions, said the Court in *South Carolina*, at 199 U.S. 461:

> ". . . indicate that the thought has been that the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the state in carrying on of an ordinary private business."

The *South Carolina* case involved a nondiscriminatory excise tax on sellers of liquor, which the Court applied to the State when it went into the business of selling liquor. *Allen v. Regents of University System* sustained the application of a federal admissions tax to athletic contests in which State colleges participated. The rationale of the decision, as stated by the Court at 304 U.S. 451, was that, "when a state embarks in a business which would normally be taxable, the fact that in so doing it is exercising a governmental power does not render it immune from Federal taxation". At pages 452 and 453, the Court asserted again that the immunity "recognized by the Constitution does not extend to business enterprises conducted by the States for gain". See also *Ohio v. Helvering* (1934), 292 U.S. 360, and *Helvering v. Powers* (1934), 293 U.S. 214.

In *New York v. United States, supra,* 326 U.S. 572, these cases, and the doctrines they espoused, were given careful

review. The eight Justices taking part in the case all agreed that some type or degree of State immunity did exist — there was a line, a limit to the federal taxing authority. In the "majority" Opinion of Justices Frankfurter and Rutledge, it was stated, at 326 U.S. 582:

> ". . . There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. . . ."

In a concurring Opinion by Chief Justice Stone, in which Justices Reed, Murphy and Burton joined, it was declared, at 326 U.S. 587, that:

> "A State may, like a private individual, own real property and receive income. But in view of our former decisions we could hardly say that a general non-discriminatory real estate tax (apportioned), or an income tax laid upon citizens and States alike could be constitutionally applied to the State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands, even though all real property and all income of the citizen is taxed. . . ."

Later, at page 589, the four Justices further quoted the following language from *Metcalf v. Mitchell* (1926), 269 U.S. 514:

> "But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which perr its both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the

> government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it."

Justices Black and Douglas dissented from the result of the case, but supported entirely the distinction raised. At page 593 of 326 U.S., they quoted with approval the doctrine of *United States v. Balto. & Ohio R.R. Co.* (1873), 17 Wall. 322, as follows:

> "The right of the states to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted."

The practical application of the "power to tax involves the power to destroy" concept was noted when the dissenters observed, at page 594, that

> ". . . Many state activities are in marginal enterprises where private capital refuses to venture. Add to the cost of these projects a federal tax and the social program may be destroyed before it can be launched. In any case, the repercussions of such a fundamental change on the credit of the States and on their programs to take care of the needy and to build for the future would be considerable."

This concept, of course is not restricted in its application to a federal tax. The same effect is manifested by any type of federal requirement which adds to the cost of marginal State activities. The greatest expense to the States already is the provision of public education and public health. In

1964, over $15.6 billion dollars was spent by State governments for their schools and hospitals. There is no return on this money except the health and well-being of the citizens of the country. To add an additional burden, by Congressional fiat, of more than $100,000,000 may well be to require a curtailment of the services, or a reduction in their quality. To paraphrase the two dissenting Justices, here too we have State activities in marginal enterprises where private capital refuses to venture. Add the additional cost and the programs may be seriously affected, if not, in some instances, destroyed.

The essential difference between the three Opinions in *New York v. United States,* or points of view expressed therein, concerned the very question involved here: where do you draw the line? Justice Rutledge seemed to believe that a federal tax could be applied against any State activity, so long as it was nondiscriminatory, and so long as Congress expressly made the tax so applicable. But, by concurring in Justice Frankfurter's Opinion, he (and Justice Frankfurter) recognized that there were certain functions peculiar to State government (see the excerpt from that Opinion, *supra,* at page 58) which could *not* be taxed. The four concurring Justices (Stone, Reed, Murphy and Burton) could not accept the nondiscriminatory character of the tax as the constitutional test. They noted, at 326 U.S. 587, that "a federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government". Accordingly, they felt that there were instances where a tax on the property and activities of private citizens may not be "constitutionally extended to the States, merely because the States are included among those who pay taxes on a like subject of

taxation". 326 U.S. 587. The test was "not the extent to which a particular State engages in the activity, *but the nature and extent of the activity by whomsoever performed is the relevant consideration*", 326 U.S. 590 (emphasis supplied).

The two dissenting Justices (Douglas and Black) were of the view that the federal government could not tax the States or State activities in any event, because such a tax amounted to requiring the States to pay a fee for the privilege of exercising their sovereign powers. In reply to the argument of Justice Frankfurter that the only recourse of the States (where a nondiscriminatory tax was concerned) was to Congress, the dissenters stated, at page 594:

> "The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system. There will often be vital regional interests represented by no majority in Congress. The Constitution was designed to keep the balance between the States and the nation outside the field of legislative controversy."

The recognition by the Court in *New York* that there was a limit to the federal taxing power vis-a-vis the States has been consistently maintained. In *Wilmette Park Dist. v. Campbell* (1949), 338 U.S. 411, the Court considered the application of a federal admissions tax to a public beach and bathing area owned and operated by a State-created park district. The tax was applied and sustained on two theories: one, that immunity, under *Allen v. University System, supra,* 304 U.S. 439, was not applicable to "such activities as might be thought not essential for the preservation of state government"; and, two, that the State was not really being burdened by the tax, which it passed on to the users of the park area. The basis for the immunity,

i.e., the interference or destruction of essential governmental functions, was, therefore, not present.

A somewhat analogous case was *United States v. Washington Toll Bridge Authority* (9th Cir., 1962), 307 F. 2d 330. The question there was the application of a federal transportation excise tax to a system of ferries plying across Puget Sound owned and operated by a State Authority. The Authority was described by the Court as "a self-supporting entity with all of the rights and liabilities of a common carrier". 307 F. 2d 331. Reviewing the aforecited cases, the Court concluded, at page 334, that

> "... it is manifest that immunity of the State activity here involved from the taxing power of the federal government cannot be successfully asserted on the *ad hoc* basis that such activity involves a governmental function. Attention must be focused on the specific activity, and on the nature and extent of interference with, or burden upon, the State, and this interference or burden must be 'actual and substantial', and not the creature of speculation and conjecture."

The Court then concluded that, because the tax was absorbed by the users of the service, "it imposes no undue economic burden upon the State of Washington". 307 F. 2d 335.

Compare *United States v. State Road Department of Florida* (5th Cir., 1958), 255 F. 2d 516, where, by statutory construction, a federal tax was held to be inapplicable to a ferry owned and operated by the State of Florida.

Judge Winter determined, in his Opinion below, that there was a difference between the power to tax and the power to regulate commerce with respect to their exercise in a manner affecting State governmental activities. Whereas the taxing power may be subject to implied limitations, he reasoned, the commerce power was not. In

support of this proposition, he relied on *Board of Trustees v. United States, supra*, 289 U.S. 48. In that case, the Court held that the federally-established tariffs on imports were applicable to articles imported by the University of Illinois. The Court sustained the tariff not as an exercise of the taxing power, which in part it obviously was, but rather as a regulation of foreign commerce. The University argued that it was immune as an agency of the State discharging a governmental function, but the Court replied that the principle of duality did not touch the authority of Congress in the regulation of foreign commerce.

There are three aspects of the case which bear attention, and which serve to distinguish it from the case at bar. In the first place, consideration must be given to the date of the case, and the state of the law at that time. In 1933, the Court still accepted the idea of nearly absolute reciprocal tax immunity. The departure from that concept expressed in *Helvering v. Gerhardt*, and particularly *Allen v. Regents of University System*, was still four years in the future, *South Carolina v. United States* not being really in point. Thus, the Court could not have sustained the tariff as a tax. Had the case been decided after 1938, the tariff could certainly have been sustained for what it was — a tax. There would have been no need to resort to the proposition that the commerce power was more potent or more extensive than the taxing power.

Secondly, the Court, with respect to the "sovereignty" argument, noted at 289 U.S. 59, that:

> ". . . the fact that the State in the performance of state functions may use imported articles does not mean that the importation is a function of state government independent of federal power."

There was nothing in the Opinion to indicate that the tariff would result in anything more than a minimal eco-

nomic burden to the State. There was no allegation that its payment may seriously interfere with the carrying out of the educational function, as the stipulated facts demonstrate here. The application of the tariff to goods imported by the University would have nowhere near the serious political and budgetary effects as Public Law 89-601. In the words of the Court in *United States v. Washington Toll Bridge Authority, supra,* 307 F. 2d at page 334, the "nature and extent of the interference with, or burden upon, the State" was not "actual and substantial", whereas here it is.

Finally, the Court considered the practical aspects of the case. In words reminiscent of the fears attributed to John Marshall as he decided *Gibbons v. Ogden* and *Brown v. Maryland, supra,* 12 Wheat. 419, the Court stated at 289 U.S. 59:

> ". . . To permit the States and their instrumentalities to import commodities for their own use, regardless of the requirements imposed by the Congress, would undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create. . . ."

No such consideration is involved here. The inability of Congress to regulate the wages of State employees does not detract from its ability effectively to regulate interstate commerce, as it has done for eighty years prior to Public Law 89-601.

Upon the reasoning expressed in *New York v. United States,* and the cases which have followed it, there can be little doubt that a federal tax on State-owned and -operated public schools and hospitals could never be sustained. There is even less doubt that a federal tax on the operations of State government would be unconstitutional. To be even more specific, Congress could not impose a tax

in the amount of the difference between $1.60 an hour and the hourly wage actually paid for each State employee (or any group of them) or a tax amounting to 50% of the hourly wage for each hour worked in excess of some federally-determined maximum.

But Appellees asserted, and Judge Winter believed, that the commerce power permits a greater latitude of Congressional action against the States than the taxing power. Because the former is characterized as plenary and exclusive, while the latter is concurrent, the argument is made that there are no limits to the commerce power (or, at least, questions of federalism are not relevant considerations). In propounding this argument, they misconstrue the rationale of the limitations on the taxing power, and do not account for the more recent expressions on the subject by this Court.

In *United States v. California, supra,* 297 U.S. 175, the Court attempted to draw a distinction between the two powers, asserting that the commerce power was not subject to the same limitations which the Court had previously applied to the taxing power (p. 184). In *New York v. United States,* however, decided ten years later, the Court rejected that distinction by holding, at page 582 of 326 U.S.: *"Surely the power of Congress to lay taxes has impliedly no less a reach than the power of Congress to regulate commerce."* (Emphasis supplied.) If, in the later case, the Court clearly recognized that there were certain State functions which could not be taxed (giving as a specific example public school houses), and if the taxing power is co-extensive with the commerce power, then it follows that these functions are not regulable as commerce either, or certainly not in the way authorized by Public Law 89-601.

The Court had previously rejected the *California* approach, at least implicitly, in *Ashton v. Cameron County, supra*, 298 U.S. 513, where it held that Congress had no power to enact bankruptcy laws applicable to the States or their agencies or subdivisions. In comparing the taxing and bankruptcy powers (and the same reasoning would necessarily hold true for the commerce power), the Court stated, at page 530:

> "The power 'To establish . . . uniform Laws on the subject of Bankruptcies' can have no higher rank or importance in our scheme of government than the power 'to lay and collect taxes'. Both are granted by the same section of the Constitution, and we find no reason for saying that one is impliedly limited by the necessity of preserving independence of the States, while the other is not. . . ."

In *United States v. Kahriger* (1953), 345 U.S. 22, the Court noted, at page 31, that "it is hard to understand why the power to tax should raise more doubts because of indirect effects than other federal powers".

The rationale of the *New York* and *Ashton* cases makes much better sense. There is nothing in Article I, Section 8 of the Constitution to indicate that one power is, by its terms, more extensive than the other. Each involves a limitation on the sovereignty of the States. But each is impliedly subject to such circumscription as may be necessary to preserve the federal-state form of government created by the Constitution.

The language in *United States v. Kahriger* (1953), 345 U.S. 22, with respect to the manner in which the Court has viewed various exercises of the regulatory and taxing powers is not apposite here. That case involved the question of whether Congress could indirectly regulate gam-

bling by means of a tax. The tax was not sought to be applied against a State.

Prior to the mid-1930s, the most formidable power Congress possessed (in terms of its use and effect) was the power to tax. John Marshall recognized this in *M'Culloch v. Maryland, supra,* 4 Wheat. 316, when he coined the phrase, "the power to tax involves the power to destroy". By reason of this, the Court was careful to hold that the maintenance of true federalism required that certain governmental functions of the States be immune from federal taxation, even though the Constitutional provision itself was unlimited in any relevant respect. The long line of cases establishing this doctrine need not be cited, because it is clearly recognized in *New York v. United States.*

The concept that the commerce power was broader than the taxing power rested on the assumption that the effect on the States (and therefore on the federal system) of the former was not as great as the latter. This is implicit in the reasoning of the Court in *United States v. California, supra,* 297 U.S., particularly at page 184.

With respect to the operation of railroads or dock terminals, this may well be true. But, when the regulation has the effect of dictating wages and hours in the public schools and hospitals, and obliterating the financial integrity of the States by nullifying the constitutional provisions relating to budgets and legislative appropriations, it can no longer be seriously contended that the commerce power has no limitations or has less of an effect upon the States. If the maintenance of federalism is the overriding consideration (and, even in the cases most favorable to the Appellees, the Court has recognized that it is), then *certainly the exercise of the commerce power can destroy just as effectively as the power to tax.*

Congress cannot tax a State, as a State, because that would enable Congress to tax a State out of existence. Congress cannot tax those activities which are peculiar to States, because that would accomplish the same result by indirection; it would enable Congress to prevent a State from carrying out its governmental functions, from exercising its reserved powers under the Tenth Amendment. These limitations are not expressed in the Constitution. They are implied from the nature of the system created by that document, not on the basis that the taxing power is concurrent, *but because, without the implication, Congress could, legislatively, abolish the States as effective instruments of government.* This is the rationale of the limitations, and it applies equally well to any power capable of such use, whether it be plenary or partial, exclusive or concurrent. The argument made here was best summarized by Justices Black and Douglas, dissenting in *New York v. United States,* when they said, at page 594, 326 U.S.: "The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." The Appellants rest upon that.

D. Use of the "Enterprise" Concept As A Determinant for Coverage Is An Unconstitutional Extension of the Commerce Power.

The original Fair Labor Standards Acts, by its terms, required an employer to pay the minimum wage and overtime premiums to "each of his employees who is engaged in commerce or in the production of goods for commerce". The test for coverage was, therefore, the activity of the *employee,* rather than the *employer.* See *Overstreet v. North Shore Corp.* (1943), 318 U.S. 125;

A. B. Kirschbaum Co. v. Walling (1942), 316 U.S. 517; *Mitchell v. Zachry Co.* (1960), 362 U.S. 310.

This was in contrast to the application of other federal Acts adopted under the commerce power to employers engaged in commerce or in industries affecting commerce, which test was expressly rejected by Congress in its consideration of the Fair Labor Standards Act. See H. Rep. No. 2738, 75th Cong. 3d Sess., pp. 29, 30; 83 Cong. Rec. 9158, 9266, 9267; *A. B. Kirschbaum Co. v. Walling, supra,* 316 U.S. 517, 522. When the extent of coverage under the Act was reviewed in *United States v. Darby, supra,* 312 U.S. 100, it was conceded that Darby's employees were not "engaged in commerce". The constitutional question, therefore, as framed by the Court at page 117, was whether

> ". . . the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce *is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it.*" (Emphasis supplied.)

In other words, although the coverage under the Act was not expressed in terms of employees or industries affecting commerce, that was the Constitutional limit of the Congressional power. The Act was sustained because the test devised by Congress fell within the limit. The cases interpreting the Act since *Darby* (but prior to 1961) have made it clear that the scope of coverage was, in fact, less than the total range of the commerce power.

See, for example, *Mitchell v. Lublin, McGaughy & Associates* (1959), 358 U.S. 207, 211; *McLeod v. Threlkeld* (1943), 319 U.S. 491; *A. B. Kirschbaum Co. v. Walling, supra,* 316 U.S. 517; *Walling v. Jacksonville Paper Co.* (1943), 317 U.S. 564; *Mitchell v. Zachry Co., supra,* 362 U.S. 310.

In 1961, coverage under the Fair Labor Standards Act was expanded by the introduction of the "enterprise" concept. In addition to the employees previously covered, employees of an "enterprise engaged in commerce or in the production of goods for commerce" were also included. The definition given to this creature was rather confusing, but essentially it meant certain enumerated enterprises having employees "handling, selling, or otherwise working on goods that have moved in or produced for commerce by any person" [Section 3 (s), 29 U.S.C., Section 203 (s)]. The effect of this new concept was that, if an enterprise had employees who handled or worked on goods that moved in commerce, not only those employees but (subject to certain specified limitations) all other employees of the enterprise and all employees of other enterprises engaged in "related activities" were covered. The test would seem to have shifted from the activity of the employee beyond that of the employer to the activities of any two or more fellow employees. Appellees argued below that the 1961 amendments did change the basic test, and that the new test has been held constitutional, citing *Wirtz v. Edisto Farms Dairy* (D. S.C., 1965), 242 F. Supp. 1, and *Goldberg v. Ed's Shopworth Supermarket* (D. La., 1963), 214 F. Supp. 781. Judges Winter and Thomsen accepted their contention, Judge Winter relying further on a number of cases involving the National Labor Relations Act.[19]

With respect to the effect of the "enterprise" concept as a change in the test, it is curious that the Court in

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[19] *N.L.R.B. v. Reliance Fuel Oil Corp.* (1963), 371 U.S. 224; *N.L.R.B. v. Denver Bldg.-Constr. Trades Council* (1951), 341 U.S. 675; *Building Trades Council v. Kinard* (1954), 346 U.S. 933; *Plumbers, etc. Local 298 v. Door County* (1959), 359 U.S. 354; *San Diego Building Trades Council v. Garmon* (1957), 353 U.S. 26; *Amalgamated Meat Cutters, etc. v. Fairlawn Meats, Inc.* (1957), 353 U.S. 20; *Howell Chevrolet Co. v. N.L.R.B.* (1953), 346 U.S. 482.

Wirtz v. Edisto Farms Dairy, supra, 242 F. Supp. 1, held that there had been no change. Speaking of the 1961 amendments, the Court said, at page 5:

> ". . . The Congress was careful to retain the existing criteria of whether employees did 'engage in commerce' or 'the production of goods for commerce' as the test to determine whether an enterprise is subject to the Act. *The basic test remains the actual type commerce engaged in by employees.*" (Emphasis supplied.)

There has actually been no judicial determination of the constitutionality of the "enterprise" test prior to the decision below. In *Wirtz v. Edisto Farms Dairy* and *Goldberg v. Ed's Shopworth Supermarket, supra,* 214 F. Supp. 781, the Courts merely concluded that, in the factual circumstances there present, the defendants had not sustained their burden of proving the Act to be unconstitutional. In fact, the Court in *Edisto* recognized that the "enterprise" test was of doubtful validity, stating, at page 5:

> "However, in considering the fact that section 3 [s] [3] sets no standard for the number of employees who must be engaged in interstate commerce before an enterprise is deemed to engage in interstate commerce, it appears that the statute does go far towards invading the field of intrastate commerce where the provisions of the Act should not be effective. Indeed, legislative history of the amendments reflects that some members of Congress had serious doubts as to its constitutionality on grounds that it would afford coverage to some employees not connected in any way with interstate commerce."

To the extent that the employees actually covered may "affect" commerce, there would seem to be no constitutional problems. This was the basis on which the claims in *Edisto* and *Ed's Shopworth Supermarket* were rejected;

the defendants were unable to show that the affected employees did not affect commerce. See also *Wirtz v. Welfare Finance Corp.* (N.D. W. Va., 1967), 263 F. Supp. 229, and *West v. Wal-Mart, Inc.* (W.D. Ark., 1967), 264 F. Supp. 158, where no constitutional challenge to the concept was made.

The cases relating to the application of the National Labor Relations Act are not apposite here. They involved generally the jurisdiction of the National Labor Relations Board to disputes between unions and contractors who purchased goods from out-of-State, or an automobile dealer described as an integral part of the General Motors national distribution system, an oil company which purchased oil produced out-of-State, or the degree of preemption of State control over labor relations. The very real and significant distinction, constitutionally, between NLRA coverage and coverage under the "enterprise" concept is that the National Labor Relations Act applies only where the employer is in commerce or an industry affecting commerce. The "enterprise" concept permits far more extensive coverage.

An employer may have two isolated employees who handle goods which have moved in commerce. That fact renders all of his other employees subject to the Act even though (1) they or their activities do not affect commerce and/or (2) the employer is not engaged in commerce or in activities which affect commerce. The test under this concept is whether two or more employees handle any goods which have moved in commerce or were produced for commerce; and this is by no means indicative that the employer's activities affect commerce. There is hardly a single enterprise in this country that does not meet the "enterprise" test devoid of sales limitations. The most local operation imaginable will use something which has moved

in commerce. Even a child's lemonade stand involves lemons and sugar grown in other States, and, if the child were entrepreneur enough to hire two friends to help him, he would be an enterprise engaged in commerce.

The only barrier to such coverage is the minimum annual gross sales limits expressed in the Act, which Congress could at its will lower or remove altogether. Because they are subject to repeal or alteration, they cannot affect the constitutionality of the "enterprise" test.

Appellants conceive of the "enterprise" concept as straddling the constitutional line. It may well be that, in a particular situation, such employees who handle goods moving in commerce would, by virtue of their handling such goods, affect commerce. In that situation, the constitutional test would be met, notwithstanding the peculiar language used to describe the coverage. This was implicit in the *Edisto* decision.

But, in attempting to apply the "enterprise" test under Public Law 89-601 to public schools and hospitals, Congress reaches employees who have no effect on commerce and who produce nothing for commerce, and to that extent its application is unlawful. The regulation relates to an employment relationship, and the constitutional consideration must be whether that relationship affects commerce. Merely to say that it does because other employees handle goods which have moved in interstate commerce, without any evidence of an actual effect, will not suffice. The clear test that the regulated activity itself must have some effect on commerce has not been met. And the attempt to expand coverage to activities which have no such effect is unconstitutional.

II.

QUESTION No. 3

PUBLIC LAW 89-601, BY APPLYING THE FAIR LABOR STANDARDS ACT TO THE STATES AND THEIR POLITICAL SUBDIVISIONS, VIOLATES THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Public Law 89-601 amended Section 3(d) of the Fair Labor Standards Act so as to remove the legislative exemption of States and their political subdivisions from the definition of "employer". It amended Section 3(s), however, to restrict the resulting application of the Act to certain classes of employees.

Section 16(b) of the Act [29 U.S.C., Section 216(b)], which was not amended by Public Law 89-601, provides:

> "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Sections 206 and 207, to which Section 16(b) refers, contain the minimum wage and premium overtime provisions. The effect of Section 16(b) therefore, is to render the States liable to suit and judgment in federal and State courts by their employees.

As was discussed earlier herein with respect to the commerce power, the States, in considering whether to ratify the proposed Constitution, were very much concerned over the extent to which the newly-created government would be able to control their affairs. Part of this concern involved the concept of sovereign immunity from suit. The States were assured, however, that there was nothing to fear, in statements such as the following from Hamilton in Federalist No. 81:

> "*It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.* This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. *A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.* The *contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced?* It is evidence, it could not be done without waging war against the contracting State, and to ascribe to the federal courts, by mere implication, and in destruction of a preexisting right of the State governments, a power which would involve such a con-

sequence, would be altogether forced and unwarrantable." (Emphasis supplied.)

When, in the case of *Chisholm v. Georgia* (1792), 2 Dall. 419, the Court attempted to remove sovereign immunity of the States in the federal courts, the hue and cry against the decision was swift and vociferous. The speed with which the Eleventh Amendment was proposed and ratified after the decision in *Chisholm v. Georgia* is eloquent evidence of the importance and the universal acceptance of the concept that a State is not suable without its consent. In the *Chisholm* case, the Court sustained its own jurisdiction over a suit by an individual against the State of Georgia. In *New Hampshire v. Louisiana* (1883), 108 U.S. 76, Chief Justice Waite, delivering the opinion of the Court, recognized the speed with which the Eleventh Amendment followed the *Chisholm* decision:

> "As soon as the decision was announced, steps were taken to obtain an Amendment of the Constitution withdrawing jurisdiction. About the time the judgment was rendered, another suit was begun against Massachusetts, and process served on John Hancock, the Governor. This led to the convening of the General Court of that Commonwealth, which passed resolutions instructing the Senators and requesting the members of the House of Representatives from the State 'To adopt the most speedy and effectual measures in their power to obtain such Amendments in the Constitution of the United States as will remove any clause or articles of the said Constitution, which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any courts of the United States.' Other States also took active measures in the same direction and, soon after the next Congress came together, the 11th Amendment to the Constitution was proposed, and afterwards ratified by the requisite number of States so as to go into effect on the 8th of January, 1798."

The Court then held that the Eleventh Amendment prohibited suits brought by a State as an agent of its citizens to collect debts owed them by another State. See also *Hans v. State of Louisiana* (1890), 134 U.S. 1, where the Court expanded the protection of the Eleventh Amendment to preclude suits in federal courts against States by their own citizens.

The immunity afforded by the Amendment cannot be overcome on the theory that the suit arises under federal law. *Duhne v. State of New Jersey* (1920), 251 U.S. 311; *Simmons v. South Carolina State Highway Department* (E.D. S.C., 1961), 195 F. Supp. 516; *Parden v. Terminal R. Co., supra*, 377 U.S. 184. The only way in which a State can be sued by individuals is if it consents to the suit.

In *Parden*, the Court found that, when the State of Alabama began operation of a railroad which directly and substantially affected interstate commerce twenty years after the enactment of the Federal Employers' Liability Act, it necessarily consented to such suits as were authorized by the Act. As stated by the Court at 377 U.S. 192:

> "... By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads, by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit. . . ."

The hypothesis of the *Parden* case is far different from the situation here. It is one thing to undertake a new commercial venture and be subject to preexisting conditions and quite another to have a whole new set of conditions

federally imposed on governmental activities which States have been conducting for over a century. A law which subjects States to suits by individuals in the latter situation does precisely what the Eleventh Amendment expressly forbids; and it cannot be seriously maintained that, by continuing to perform a function which is both necessary and traditional, the States have consented to being sued. If the mere purchase of goods and services from interstate commerce is enough to imply a consent, then the Eleventh Amendment would have no real vitality, its very purpose and intent frustrated. This is not to be presumed.

In the court below, Appellees argued that Section 16(c) of the Act [29 U.S.C., Section 216(c)] authorizes the Administrator of the Wage and Hour Division of the Department of Labor to file suits on behalf of the individual employees, and that suits by the United States are not enjoined by the Eleventh Amendment. The answer to this contention is twofold. In the first place, even if Section 16(c) were valid, that would not validate Section 16(b), which authorizes individual suits. Even as to 16(c), however, the Administrator's authority to sue is merely derivative from the rights purportedly extended under 16(b). The Administrator is not suing for himself or on behalf of the United States, but for the account of the individual employees. Section 16(c) specifically provides that any sums recovered by the Administrator shall be placed in a special account and paid over to the employees. This type of indirection and vicarious standing is no different than that which was held to be unconstitutional in *New Hampshire v. Louisiana, supra,* 108 U.S. 76, where the Court held that a State could not sue another State on behalf of its citizens to collect a debt due to them individually.

Cases such as *United States v. Mississippi* (1965), 380 U.S. 128, and *Louisiana v. United States* (1965), 380 U.S.

145, are distinguishable on their facts. There, the Attorney General sued under provisions of a Civil Rights Act to restrain the State from enforcing unconstitutional laws which denied persons the right to vote. In the *Mississippi* case, where the jurisdictional defense of the Eleventh Amendment was considered, the Court reasoned that the principle involved was the Fifteenth Amendment, which obviously is of equal status with the Eleventh. That Amendment expressly forbade the States from denying their citizens the right to vote because of their color, and also authorized Congress to enforce the Amendment by appropriate legislation. The defendant States were doing what the Constitution said they could not do, and Congress had the power to authorize judicial action to stop them.

There is no such situation here. The States are not depriving anyone of their Constitutional rights, and there is no Constitutional authority, as in the Fifteenth Amendment, for Congress to authorize suits against them.

Accordingly, Public Law 89-601, or at least the sections thereof which authorize suits against the States, is in contravention of the Eleventh Amendment and therefore void.

III.

Question No. 7

ARE THE PUBLIC SCHOOLS AND HOSPITALS OF THE STATES AND THEIR POLITICAL SUBDIVISIONS THE ULTIMATE CONSUMERS OF THE GOODS AND SERVICES PURCHASED BY THEM IN COMMERCE AND THEREFORE NOT SUBJECT TO THE FAIR LABOR STANDARDS ACT?

In contrast to the other questions presented in this appeal, this question is not one of constitutional law, but rather of statutory construction. It is, nevertheless, one which is appropriate for consideration by the Court. *A. B. Kirschbaum v. Walling, supra,* 316 U.S. 517; *Mitchell v. Zachry Co., supra,* 362, U.S. 310.

As noted, coverage under the original Act was limited to employees engaged in commerce or in the production of goods for commerce. The word "goods" was defined in Section 3 (i) of the Act as

> "goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, *but does not include goods after their deliverey into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.*" (Emphasis supplied.)

It was thus recognized from the beginning that coverage was not to be extended to employees of ultimate consumers (unless, of course, they were covered on some other basis). See, for example, *Barbe v. Cummins Const. Co.* (D.C. Md., 1943), 49 F. Supp. 168, *aff'd per curiam* 138 F. 2d 667; *Rhude v. Jansen Construction Co., Inc.* (D.C. N.D. Tex., 1965), 54 L.C. ¶31,870, *aff'd* 369 F. 2d 806. *Cf. Jackson v. Northwest Airlines* (D.C. Minn., 1947), 75 F. Supp. 32, *aff'd* 185 F. 2d 74, *cert. den.* 342 U.S. 812; *Gordon v. Paducah Ice Mfg. Co.* (D.C. W.D. Ky., 1941), 41 F. Supp. 980, where the exemption was held not to apply to the employees producing or transporting such goods *prior to* delivery to the ultimate consumer. Compare also *Lynch v. Embry-Riddle Co.*, (D.C. S.D. Fla., 1945), 63 F. Supp. 992.

The above cases considered the definition of "goods" in the context of the then existing test of coverage, i.e., employees engaged in commerce or in the production of goods for commerce. There is no indication, however, that by enacting a new test in 1961 Congress intended to include employees working on goods where their employer is the ultimate consumer of such goods. The definition of "goods" was unchanged, and the definition of an "enterprise engaged in commerce or in the production of goods for com-

merce" still relates to "goods". Section 3 (s) of the Act [29 U.S.C., Section 203 (s)] defines such an enterprise as one

> "which has employees engaged in commerce or in the production of *goods* for commerce, including employees handling, selling, or otherwise working on *goods* that have been moved in or produced for commerce by any person, and which . . ." (emphasis supplied).

is engaged in the operation of a school or hospital.

In order to assert coverage sucessfully, Appellees must show that the public schools and hospitals have employees who handle goods which are for resale (or of which their employer is not the ultimate consumer) and which were produced for or have moved in commerce. The stipulated facts bear directly on this matter. With respect to Maryland, it was agreed that:

> "The materials, supplies and equipment purchased by the State hospitals, the University Hospital and the local school systems are purchased for use and consumption by said agencies in the performance of their functions. Certain items, such as books used in the schools, are made available to students on a temporary basis and without charge, unless lost or destroyed. Other items, such as lockers, chairs and desks, remain in the possession of, and on the premises of, the school but are assigned to the students temporarily. Still others, such as visual aids, are neither delivered nor assigned to individual students but are operated by school employees for the benefit of students as a group. Materials, supplies and equipment purchased and used by the hospitals in relation to their patients are similarly handled except with respect to drugs, medicines and foods administered to the patients, generally without charge, and not returned. At the University Hospital charges are made to paying patients."

An identical stipulation was filed with respect to Ohio and, although worded differently, there is nothing in the Texas stipulations to suggest a different procedure there. It was agreed, of course, that the facts with respect to the three States may be taken as representative of the nation generally.

There was no evidence presented below to show that the employees of the public schools and hospitals work on or handle any goods purchased in commerce for resale. The items they touch are for the use of their employer. Their journey in commerce ends when they reach the employer's receiving door. There can be no clearer example of goods in the hands of an ultimate consumer.

CONCLUSION

For the reasons set out above, it is respectfully submitted that the Fair Labor Standards Act, as amended by Public Law 89-601, to the extent that coverage thereunder is extended to employees of State and local governmental agencies and institutions, (1) is in contravention of the United States Constitution and (2) is in contravention of Sections 3 (i), (r) and (s) of said Act, and in either case is null and void.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 742

STATE OF MARYLAND, ET AL.,
Appellants,

v.

W. WILLARD WIRTZ,
SECRETARY OF LABOR, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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TABLE OF CONTENTS

	PAGE
Opinion of Lower Court	1a
Judgment of Lower Court	51a
Complaint of State of Maryland	52a
Motion of Defendants to Dismiss or in the Alternative for Summary Judgment	59a
Order of Lower Court Granting Leave to State of Texas to Intervene	60a
Motion of Plaintiffs for Summary Judgment	60a
Stipulations:	
State of Maryland and Defendants	61a
State of Ohio and Defendants	80a
State of Texas and Defendants	81a
Defendants and Plaintiffs	109a
Exhibits:	
Defendants' A-1	112a
Defendants' A-2	117a
Defendants' A-3	119a
Defendants' A-4 (Attachment B)	122a
Defendants' C	123a

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

APPELLANTS' APPENDIX

In The United States District Court for the District of Maryland

Civil Action No. 18005

State of Maryland, et al.,
Plaintiffs,

v.

W. Willard Wirtz, Secretary of Labor, United States Department of Labor, et al.,
Defendants.

OPINION OF COURT

(Filed June 13, 1967)

Before: Winter, Circuit Judge, Thomsen, Chief Judge, and Northrop, District Judge.

WINTER, Circuit Judge:

This is an action brought by the State of Maryland, in which twenty-five other States have intervened as parties plaintiff, asking the Court to declare unconstitutional the 1966 Amendments to the Fair Labor Standards Act[1] (the "1966 Amendments") insofar as they apply to employees of the plaintiff States, and to enjoin enforcement of the Act, as amended, against the States. Although the 1966 Amendments extend the Act's coverage to employees of enterprises, whether public or private, engaged in the operation of schools, hospitals and related institutions, street, suburban or interurban electric railways, and local trolley and motorbus carriers, the States, in briefs and

[1] Public Law, 89-601, 80 Stat. 830, amending the Fair Labor Standards Act of 1938, 29 U.S.C.A. §§201, *et seq.*

oral argument, challenge application of the Act only to public schools, hospitals and related institutions; and this Court will limit its consideration accordingly.

Defendants have filed a motion to dismiss or, in the alternative, a motion for summary judgment. Plaintiffs have filed cross-motions for summary judgment. The parties have entered into extensive stipulations of fact with regard to Maryland, Texas and Ohio. It is agreed that these data may be taken as representative of the situation in the other plaintiff States. Some objections to relevancy and materiality have been raised, but the Court is satisfied that the conclusions reached herein would not be affected by the exclusion of any of the stipulation evidence.

Introduction

The Fair Labor Standards Act, 29 U.S.C.A. §§ 201, *et seq.*, was first enacted in 1938 as a result of Congressional findings, recited in § 2(a) of the Act, 29 U.S.C.A. § 202, that:

> "the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

It was therefore declared to be the policy of Congress, through the exercise of its power to regulate commerce among the several states "to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employments or earning power." 29 U.S.C.A. § 202(b). Congress

accordingly provided that employers must pay those employees who were "engaged in commerce or in the production of goods for commerce" a minimum hourly wage, 29 U.S.C.A. § 206(a), and one and one-half times their regular hourly rate for weekly hours over a specified maximum, 29 U.S.C.A. § 207(a)(1). States and their political subdivisions were excluded from the Act's definition of "Employer." 29 U.S.C.A. § 203(d).

The constitutionality of the original Act was sustained in *United States v. Darby*, 312 U.S. 100 (1941). The Court stated, *inter alia*, that the power of Congress over commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Id.*, at p. 118.[2]

The Act has been amended several times,[3] but until the 1966 Amendments state employees were not brought within its coverage.

In 1961 the "enterprise" concept was introduced. 29 U.S.C.A. § 203(r), 75 Stat. 65. In addition to employees previously covered — those personally engaged in interstate commerce or in the production of goods for commerce — the Act was extended to cover "the related activities performed (either through unified operation or common

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[2] Subsequent decisions have pointed out that "Congress did not exercise in this Act the full scope of the commerce power," but rather chose "to regulate only part of what it constitutionally can regulate." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570-571 (1943); *Kirschbaum Co. v. Walling*, 316 U.S. 517, 521-522 (1942). See also *Overstreet v. North Shore Corp.*, 318 U.S. 125, 128 (1943); *Higgins v. Carr Bros. Co.*, 317 U.S. 572, 574 (1943); *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, 313 (1960).

[3] The principal amendatory enactments have been the Portal-to-Portal Act of 1947 (61 Stat. 84), the Fair Labor Standards Amendments of 1949 (63 Stat. 910), the Fair Labor Standards Amendments of 1955 (69 Stat. 711), the Fair Labor Standards Amendments of 1961 (75 Stat. 65), the Equal Pay Act of 1963 (77 Stat. 56), and the Fair Labor Standards Amendments of 1966 (80 Stat. 830).

control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor." An "enterprise engaged in commerce or in the production of goods for commerce," and therefore covered by the Act, was defined in terms of a minimum annual dollar volume of gross sales and, in some instances, the particular type of business involved. See 29 U.S.C.A. § 203(r) and (s). The validity and scope of the enterprise concept has not yet been decided by the Supreme Court.

The 1966 Amendments extended the enterprise basis of coverage and brought within the Act public as well as private enterprises engaged in operating schools, hospitals and related institutions, street, suburban or interurban electric railways, and local trolley or motorbus carriers.[4] The definition of "employer" in 29 U.S.C.A. § 203(d) was amended to eliminate the existing exclusion of States and their political subdivisions insofar as they engaged in those activities. In fitting employees first covered by the 1966 Amendments into the minimum wage and maximum hour scale of employees theretofore covered, the 1966 Amend-

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[4] In addition to amending the Act's definition of "employer" (see text, *infra*), other pertinent changes effected by the 1966 Amendments were: an existing exemption for hospitals and certain related institutions and schools for handicapped or gifted children, formerly contained in §13(a)(2)(iii), was eliminated, and such institutions and schools, as well as elementary and secondary schools and institutions of higher learning, were designated in §3(s)(4) as types of enterprises whose coverage would not depend on an annual gross volume test; the existing annual gross volume test for local transit enterprises (in former §3(s)(2)) was lowered from $1 million to $500,000 until Feb. 1, 1969 and to $250,000 thereafter (§3(s)(1)); and the definition of "enterprise" in §3(r) was amended to provide that local transit operations, the above described schools and hospitals and related institutions, whether public or private or for profit or not for profit, would be regarded as operated for a "business" purpose.

ments provide for an escalation of the minimum wage and of maximum hours over a period of five years.[5]

The 1966 Amendments, which thus had the effect of extending the minimum wage and overtime provisions of the Fair Labor Standards Act to a *portion* of the labor market not theretofore covered,[6] are attacked insofar as they extend coverage to certain employees of public schools, hospitals and related institutions. Despite the impression sought to be created by several of the plaintiff States, extension of the Act to certain groups of state employees was not a concept first advanced in the Second Session of the 89th Congress under circumstances which would have prevented the States from presenting their views in opposition to the proposal, had they sought to keep abreast of matters under consideration by Congress.

The first legislative effort to extend coverage to some state employees occurred in the First Session of the 89th Congress.[7] During the Second Session of the 89th Congress,

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[5] Thus, while the minimum wage for employees theretofore covered by the Act is $1.40 per hour, for the first year after February 1, 1967, and $1.60 per hour thereafter, minimum wages for employees newly covered are $1.00 per hour, for the first year and increase 15¢ per year for each year thereafter until the level of $1.60 is reached. Similarly, overtime must be paid to employees theretofore covered who work in excess of 40 hours per week, while overtime must be paid to newly covered employees who work more than 44 hours, the first year, 42 hours, the second year, and 40 hours each year thereafter, respectively, after February 1, 1967.

[6] While the 1966 Amendments to the Fair Labor Standards Act, *inter alia*, extend the Act's coverage to employees of schools, hospitals and related institutions, electric railways, trolley and motorbus systems, *whether public or private*, not every employee of such enterprise is made subject to the Act. Section 13 of the Act, 29 U.S.C.A. §213, as it existed prior to the effective date of the 1966 Amendments, and as amended by the 1966 Amendments, exempts certain classes of employees. For our purposes, the significant exemption is that of a person "employed in a bona fide executive, administrative or professional capacity (including any employee employed in the capacity of academic, administrative personnel or teacher in elementary or secondary school * * *)."

[7] During the 89th Congress, 1st Session, H. R. 8259, was introduced in response to a special message of President Johnson urging,

when H. R. 13712, which, as amended, was enacted as the 1966 Amendments, was introduced into the House of Representatives, it contained language which would have extended coverage (subject to the exemptions in § 13)[8] to any person "in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally handicapped or gifted children, or an institution of higher education (*regardless of whether or not such hospital, institution or school is public or private or operated for profit or not for profit*) * * *."[9] (Emphasis supplied.) During legislative consideration of the bill, the only variation as to the extent of coverage, pertinent to this law suit, was whether public or private school employees covered should be limited to those employed by "an institution of higher education" or whether they should include persons employed by "an elementary or secondary school."[10] The

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inter alia, extension of the Fair Labor Standards Act to an additional 4½ million workers. H. R. 8260 introduced by Mr. Roosevelt, also would have extended coverage of the Act. Neither bill purported to be applicable to state employees. While hearings on both bills were being conducted by the House Committee on Education and Labor, to which they had been referred, Mr. Roosevelt introduced another bill, H. R. 10518. This new bill extended coverage to certain employees of public and private hospitals and institutions of higher education regardless of whether public or private, profit or non-profit.

H. R. 10518 was referred to the Committee on Education and Labor which, on August 25, 1965, reported the bill favorably, without amendment, and recommended that it be passed. House Rpt. No. 871, 89th Cong., 1st Sess. H. R. 10518 was then committed to the Committee of the Whole House on the State of the Union and no further action was taken thereon. Cong. Quart. Almanac, 1965, Vol. 21, p. 861.

[8] See, n. 6, *supra*.

[9] The bill as originally introduced would have also extended coverage to employees of a "street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (*regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit*) * * *." (Emphasis supplied.)

[10] As introduced, the bill did not apply to employees of elementary and secondary schools, although it did apply to employees of insti-

question was resolved by extending coverage to employees of elementary and secondary schools, as well as institutions of higher learning, subject, again, to the exemptions contained in § 13 of the Act, as also amended by the 1966 Amendments.

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tutions of higher learning, whether public or private. After the House Education and Labor Committee reported the bill favorably, with amendments, the House resolved itself into the Committee of the Whole House on the State of the Union. At this point in the legislative process, Mr. Collier, of Illinois, offered an amendment to extend coverage to employees of elementary and secondary schools. The amendment was adopted and the bill passed the House as so amended. He made the following statement about the rationale of his amendment, viz.,

"(Mr. Collier) Mr. Chairman, these amendments are simple and sound and essential amendments. I do not believe that any member of this body who believes in the principle and purpose of the bill before us today can oppose them.

"What we have done here, if Members will review with me the language of the definition of 'enterprise,' is to say that in sum and substance the employee who works as a dishwasher in a home for the sick or the aged or mentally ill, or one who works as a dishwasher in a college or university cafeteria, or one who works as a dishwasher, for example, in a mental institution, is covered under this bill. Yet, the same employee working as a dishwasher in an elementary or high school cafeteria is not covered.

"*All I want to do is to establish equity in application of the bill.* Let me tell why. I believe I can best explain it by giving an example. This is an actual case.

"In a suburban area of one of our suburban States, school officials were recently notified that poverty funds were available to hire students who qualified under the poverty family income level at $1.25 per hour. What happened was this: The same school had working in the cafeteria women who had been employed for years — in fact, one was a widow — drawing 85 cents an hour for working in the school cafeteria. Yet, children were handpicked and given $1.25 an hour to wash blackboards in the same school.

"I do not believe there is anyone sitting in this House today who can justify this type of situation realizing, as we all must, that there will be under the poverty program a $1.25 hourly wage level. If not, then I would have grave reservation as to the depth of the sincerity such a Member would have in the principle of minimum wage.

"(Mr. Pucinski) Mr. Chairman, will the gentleman yield?

"(Mr. Collier) I yield to the gentleman from Illinois.

"(Mr. Pucinski) Mr. Chairman, if I understand this amendment correctly, it will establish a different fair labor standard provision

The plaintiff States attack the constitutionality of the 1966 Amendments on the ground that the activities of the States and various school districts in the operation of schools, hospitals and related institutions are not commerce,[11] that the "enterprise" concept embodied in the Act by amendments adopted in 1961 is unconstitutional, and that the 1966 Amendments unconstitutionally impugn state sovereignty.[12]

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for people presently employed in elementary and secondary schools and universities.

"(Mr. Collier) That is exactly correct. *I do not want any inequities such as we have been talking about today. We are moving to achieve equity which means treating everyone alike.*" (Emphasis supplied.) 112 Congressional Record (May 25, 1966), pp. 10820-10821.

The Senate Committee on Labor and Public Welfare reported the bill favorably, with an amendment to *exclude* employees of elementary and secondary schools, and this amendment was adopted. Senate Report No. 1487, August 23, 1966, 2 U.S.C. Congressional and Administrative News (89th Congress — Second Session, 1966), p. 3002. The Senate Committee, however, did not undertake to exclude any other public employees from coverage under the Act. The excluded coverage was subsequently restored by the Conference Committee appointed to iron out differences between the House and Senate versions of the legislation. Conference Report No. 2004, September 6, 1966, 2 U.S.C. Congressional and Administrative News, *supra*, p. 3047. It was with an extension of coverage to employees of elementary and secondary schools that H. R. 13712 was finally enacted and signed into law.

[11] Texas words this point as follows: "A state in the performance of the functions of its sovereignty is not engaged in commerce within the meaning of the commerce clause of the constitution of the United States."

[12] Maryland also advances an argument based upon the Eleventh Amendment and its asserted conflict with the provision of the Fair Labor Standards Act which permits an employee not paid in accordance with the minimum wage or overtime provisions of the Act to bring suit if such suit is not brought by the Secretary. 29 U.S.C.A. §216. This argument is beyond the scope of this consolidated proceeding and will not be further considered at this time. It may be made if and when the basic validity of the 1966 Amendments is established and some State employee attempts to sue his employer. Of course, when the argument is advanced and if it is found valid, due regard will be given to the other enforcement provisions con-

I conclude, for the reasons hereafter stated, that all three of these contentions should be resolved against the plaintiffs, that to the extent of the scope of this proceeding the 1966 Amendments should be declared valid and constitutional, and that injunctive relief should be denied.

Commerce Power

Maryland and Texas argue that the activities of a State do not constitute "commerce" which may be regulated under the exclusive power vested in Congress to regulate interstate and foreign commerce. Maryland argues more specifically that, with respect to the operation of public schools, the State's activity has three attributes which remove it from any legitimate definition of commerce, i. e., the activity is non-profit, it is purely governmental, and there is no non-governmental system to compete with or substitute for it.

At the outset, it is well to note that these arguments are based upon a more restrictive premise than the decided cases will support. *United States v. Darby, supra,* upholding the constitutionality of the Fair Labor Standards Act generally, is only one of many decisions which holds that the power of Congress over interstate commerce includes not only that which in itself is interstate commerce but also "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it, as to make the regulation of them appropriate

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tained in 29 U.S.C.A. §216 and the separability language in 29 U.S.C.A. §219.

Maryland and Texas also argue that their schools and hospitals are the "ultimate consumers" of commodities purchased from out-of-state, that such commodities are not "goods" as defined by 29 U.S.C.A. §203(i) and, as a consequence, the Fair Labor Standards Act is not applicable to them. This argument is one of statutory construction, not of constitutional significance, and is also one beyond the scope of this proceeding. It should be asserted in a suit in which the application of the Act to a particular school or hospital is brought into question, so that after full development of the facts, it may be determined if that particular enterprise meets the statutory tests for coverage.

means to the attainment of a legitimate end." *Id.*, at p. 118. See also, *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 300-301 (1964). Among the decided cases, the most extreme example of the reach of the commerce power of Congress to regulate local activity is *Wickard v. Filburn*, 317 U.S. 11 (1942), where a farmer's consumption of wheat raised on his own farm was held within the reach of Congress to regulate under the commerce clause because that consumption, and its counterpart on other farms, exerted a substantial economic effect on interstate commerce.

Thus, the proper inquiry is not limited to a consideration of whether the activities of the States in operating public schools, schools of higher education or hospitals, are "commerce" as such. The proper inquiry is much broader. It is whether such activities are commerce or affect commerce, even though local in nature, and hence within the power of Congress to regulate commerce.

Maryland's claims that public schools are non-profit, purely governmental and not in direct competition with non-governmental systems are not shibboleths to determine what is and what is not commerce. "Commerce" is not confined to "business" activity in a conventional sense; it includes non-business and non-profit activities, whether private or governmental in nature and irrespective of whether they compete with or may be substituted for by private enterprise. *Powell v. U. S. Cartridge Co.*, 339 U.S. 497 (1950); *Mitchell v. Lublin, McGaughy & Asso.*, 358 U.S. 207 (1959); *United States v. Ohio*, 385 U.S. 9 (1966); *Wirtz v. R. E. Lee Electric Company*, 339 F. 2d 686 (4 Cir. 1964); *Mitchell v. Owen*, 292 F. 2d 71 (6 Cir. 1961); *Goldberg v. Nolla, Galib & Cia*, 291 F. 2d 371 (1 Cir. 1961), *cert. den.*, 368 U.S. 900 (1961); *N.L.R.B. v. Central Disp. & E. Hosp.*, 145 F. 2d 852 (D.C. Cir. 1945), *cert. den.*, 324 U.S. 847 (1945).[13] In *Public Building Authority of Birmingham v.*

[13] Pertinent also are the following authorities which have held to be "commerce," *non-commercial* interstate transportation of persons and chattels; *Edwards v. California*, 314 U.S. 160 (1941)

Goldberg, 298 F. 2d 367, 370 (5 Cir. 1962), the Court, in holding that federal employees engaged in processing claims for the payment of social security benefits and preparing government checks for beneficiaries were producing goods for commerce, summarized prior holdings by declaring that "there need be no private parties or profit motive present to constitute commerce." It will be noted that this was said in a case in which all of the factors urged by Maryland to render her activities not within the commerce power of Congress were present: the activity was governmental, non-profit, and could not be performed by private enterprise.

The fact is that under the stipulations before us there is abundant evidence that the States, in the performance of the functions where certain employees are covered by the Act, as amended by the 1966 Amendments, are not only engaging in commerce, or in the production of goods for commerce, but are engaging in activities, local in nature, which have a substantial effect on commerce. A brief recital of some of the stipulations between the parties is sufficient to demonstrate.

In the current fiscal year an estimated $38.3 billion will be spent by State and local public educational institutions in the United States. In the fiscal year 1965, these same authorities spent $3.9 billion operating public hospitals. Expenditures of this magnitude are bound to have an enormous impact on interstate commerce.

For Maryland, which was stipulated to be typical of the plaintiff States, 87% of the $8 million spent for supplies

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(movement of indigent persons across state lines); *Thornton v. United States*, 271 U.S. 414 (1926) (diseased cattle ranging across state lines); *Caminetti v. United States*, 242 U.S. 470 (1917) (transportation of women across state lines for non-commercial immoral purposes); *Brooks v. United States*, 267 U.S. 432 (1925) (transportation of stolen articles); *United States v. Hill*, 248 U.S. 420 (1919) (transportation of liquor for one's own consumption). As a latest expression of the state of the law, *Heart of Atlanta Motel, Inc. v. United States, supra*, at pp. 256-257, declares: "Nor does it make any difference whether the transportation is commercial in character."

and equipment by its public school system during the fiscal year 1965 represented direct interstate purchases. Over 55% of the $576,000 spent for drugs, x-ray supplies and equipment and hospital beds by the University of Maryland Hospital and seven other state hospitals were out-of-state purchases. With respect to seven other state hospitals which spent $875,000 on such items during the comparable period, the parties have stipulated that all or "the most part" of such items were manufactured outside of Maryland.

In Ohio, also stipulated to be typical of all of the plaintiff States, there are 708 school districts, 3 of which (stipulated to be typical of the other school districts) purchased a total of $323,000 in supplies in the fiscal year 1966. Approximately 50% of these purchases were directly from outside of the state. Ohio's six state universities spent $9 million on certain specified supplies in that year, over 42% of which were purchased directly from out-of-state, with an undetermined portion of the remainder being manufactured outside the state.

In Texas, all text books originate outside the state, and it is stipulated that "the major portion" of drugs and hospital equipment is either purchased directly from out of the state or is at least manufactured in other states.

The interstate flow of school and hospital supplies and equipment is, in large part, inevitable because of the non-diffusion of manufacturing supplies. For example, there are no Maryland suppliers for fourteen out of eighteen major categories of school supplies and equipment. Even larger States, such as Ohio and Texas, have no producers, or very few producers, of text books, science equipment and physical education equipment.

Not only do public schools and hospitals give rise to a large interstate flow of supplies and equipment, having a correspondingly substantial effect upon interstate commerce, public schools and hospitals are directly engaged in commerce and the production of goods for commerce by virtue of federal aid to education and health, involving billions of dollars. Over $4 billion is spent each year in federal grants, of which over $2 billion goes for elementary

and secondary public education, 50% of which is granted directly to local school districts under programs requiring extensive communications between local schools and regional and national facilities of the United States Office of Education. In the area of health services, federal expenditures during fiscal year 1965 amounted to $5 billion, while State and local government expenditures amounted to $4.9 billion. Included in the total of federal expenditures, are annual federal assistance of $260 million for the construction and enlargement of hospitals and other health facilities, annual medical research grants of over $600 million, and public health grants of $65 million to support State and local health agencies, both in operating costs and in programs for the control of disease. Additionally, the Social Security Administration during fiscal 1967 will pay out $2.35 billion for hospital services under the Medicare program, in which 94% of the hospitals in the country, both public and private, currently participate. Another 1 billion will be spent for direct reimbursement to hospitals and physicians for services to eligible patients. These programs create a regular interstate flow of funds to participating hospitals, extensive interstate communication and preparation of materials for interstate transmission by both local hospitals and state agencies, including engineering and architectual plans for hospital construction and enlargement, research data and reports, medical benefits claims, and numerous other types of reports and records.

"Ideas, wishes, orders and intelligence" are "subjects of commerce," *Western Union v. Lenroot*, 323 U.S. 490, 502-503 (1945), and the preparation of written documents and other materials for out-of-state transmission, as well as the actual interstate transmission of funds, documents and other communications, are all activities in commerce. *Beneficial Finance Co. v. Wirtz*, 346 F. 2d 340 (7 Cir. 1965); *Willmark Service System, Inc. v. Wirtz*, 317 F. 2d 486 (8 Cir. 1963), *cert. den.*, 375 U.S. 897 (1963); *Public Building Authority of Birmingham v. Goldberg*, 298 F. 2d 307 (5 Cir. 1962); *Mitchell v. Kroger Company*, 248 F. 2d 935 (8 Cir. 1957); *Aetna Finance Co. v. Mitchell*, 247 F. 2d 190 (1 Cir. 1957). Thus, from these activities, as well as the

out-of-state purchases and the receipt of interstate shipments which are either stipulated or inescapably must be inferred from the facts stated, the conclusion is inevitable that the activities of the states are "*in*" commerce, constitute the production of goods for commerce, or substantially affect commerce, although local in nature. Leaving aside for the moment the question of state sovereignty, I conclude that these activities are clearly within the power of Congress to regulate commerce.

The Enterprise Concept

The only authorities to pass on the constitutionality of the enterprise concept, *Wirtz v. Edisto Farms Dairy*, 242 F.S. 1 (D. S.C. 1965), and *Goldberg v. Ed's Shopworth Supermarket*, 214 F.S. 781 (W.D. La. 1963), have both sustained its validity. From my examination of the pertinent authorities, I am in accord with the result reached in those decisions and conclude that the enterprise concept embodied in the Fair Labor Standards Act in 1961, 29 U.S.C.A. § 203(r), represents a constitutionally valid exercise of the power of Congress to regulate commerce.

As I have recited, prior to 1961 the Fair Labor Standards Act applied only to those employees who themselves engaged in commerce or in the production of goods for commerce. By the provisions of the 1961 Amendments, *all* employees of various enterprises whose activities related to the movement of goods in commerce, including those engaged in selling, distributing or using goods that had previously moved in commerce became subject to the Act, subject, of course, to the exemptions contained in § 13 of the Act, 29 U.S.C.A. § 213.[14]

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[14] The 1961 extension of the Act's coverage had the effect of adding over four million workers to the twenty-four million previously within the Act's protection. This extension of coverage was the result of deliberate and lengthy consideration by at least two Congresses. (Senate Report No. 145, 87th Congress, First Session, pp. 2, 10; House Report No. 75, 87th Congress, First Session, pp. 2, 7). Exercise of the power to extend coverage was based upon the conclusion discussed in detail in the Committee Reports of both the Senate and the House, that the additional coverage was necessary

Translated into a concrete example, the enterprise concept, as amended by the 1966 Amendments, means that in a private or public hospital the nurse's aid or maintenance worker, even though not engaged in commerce or in the production of goods for commerce, is subject to the minimum wage and overtime provisions of the Act if some employee of the hospital is engaged in commerce or in the production of goods for commerce, or handling goods in commerce. That Congress may constitutionally so extend coverage seems clear from the decided cases, of which Congress was fully aware when it first adopted the enterprise concept in 1961.[15] Indeed, it may properly be concluded that in adopting the enterprise concept Congress did not exercise to the limit its full power to regulate commerce, because application of the enterprise concept is conditioned upon the presence of some employee directly engaging in commerce, producing goods for commerce or handling goods in commerce. From the authorities it may be concluded that the enterprise concept could have been conditioned upon some employee engaging in local activity "affecting commerce" short of the actual interstate activity previously mentioned.[16]

One of the leading authorities pointing to the conclusions just stated is *Labor Board v. Reliance Fuel Corp.*, 371 U.S. 224 (1963), in which the National Labor Relations Board's jurisdiction over unfair labor practices committed by a retail distributor of fuel oil, all of whose sales were local where the retailer obtained the oil from a wholesaler who imported it from another state, was upheld. The conclusion resulted from the Court's construction of the

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to accomplish the Act's original purposes and was within the scope of the federal commerce power as evidenced by existing precedents under the National Labor Relations Act and other regulatory statutes.

[15] See e.g., Senate Report No. 145, April 10, 1961, 87th Congress First Session, 2 U.S. Code and Adm. News (87th Cong., 1st Sess., 1961), pp. 1622-1623.

[16] In this regard, the authorities cited in footnote 2, *supra*, all of which were decided prior to the 1961 Amendments are pertinent. They clearly indicate that prior to 1961, there were interstices in the Act which Congress could constitutionally fill. As pointed out in the text, they were only partially filed in 1961.

National Labor Relations Act to vest in the Board "* * * the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause" (*Id.*, at p. 226), and the citation of *Wickard v. Filburn, supra,* to support the conclusion that the distributor's activities affected commerce and were within the constitutional reach of Congress to regulate. Reference was also made to *Polish Nat. Alliance v. N.L.R.B.*, 322 U.S. 643 (1944), for the proposition that in enacting the National Labor Relations Act "* * * Congress had explicitly regulated not merely transactions or goods in interstate commerce, but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce." *Id.*, at p. 648.

Similarly, in *N.L.R.B. v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951); *Bldg. Trades Council v. Kinard Const. Co.*, 346 U.S. 993 (1954); and *Plumbers Union v. Door County*, 359 U.S. 354 (1959), the use of materials from out-of-state provided the basis for National Labor Relations Board jurisdiction with respect to the construction, respectively, of an office building, a court house and a housing project. See also, *San Diego Unions v. Garmon*, 353 U.S. 26 (1957); *Meat Cutters v. Fairlawn Meats*, 353 U.S. 20 (1957). See also, *Howell Chevrolet Co. v. N.L.R.B.*, 346 U.S. 482 (1953).

If the National Labor Relations Board may regulate the acts of the employer toward each employee of the fuel oil retail distributor and every construction worker on a building project without regard to whether that employee is directly engaged in interstate commerce simply because some goods are bought by the company out-of-state, it cannot be doubted that the nurse's aid or hospital maintenance worker likewise may be brought under the coverage of the Fair Labor Standards Act when someone employed by the hospital purchases drugs and equipment out-of-state, or purchases from local sources drugs and equipment which were produced out-of-state, or handles drugs and equipment originating from out-of-state, or the hospital engages in commerce in administering and carrying out a federal health grant or the program of Medicare, even

through the nurse's aid or maintenance worker himself does not carry on such activities. The same is true in regard to employees of schools, elementary, secondary, or institutions of higher learning, and specialized hospitals engaged in treatment of the mentally ill, those suffering from contagious diseases, the aged, or the handicapped.

It is a matter of elementary logic that the hospital and the school function as a result of the sum of all of the activities of all of their employees. The hospital administrator or the superintendent of education (himself exempt from the provisions of the Act), or his secretary, or some other employees, would have no occasion to engage in commerce, or the production of goods in commerce, if the services of the employees covered by the Act under the 1966 Amendments were permanently withdrawn. Their services are essential to the operation of the hospital or the school and, hence, their activities, although local in nature, substantially affect commerce, so that Congress may regulate the minimum wages to be paid them as well as the maximum hours they may be required to work without payment of overtime.

STATE SOVEREIGNTY

The precise claim of unconstitutional interference with state sovereignty made in this case has not been adjudicated by any court, because Congress has not heretofore attempted to regulate minimum wages and maximum hours (without overtime) for state employees. But from what has been decided in numerous other contexts analogous to the case at bar, and from the basis of those decisions, I can only conclude that the 1966 Amendments are valid and constitutional in their entirety. I have already referred to the cases in which the full extent of the power of Congress generally to regulate commerce has been developed. In every instance in which the exercise of this power has been applied to some state activity, the validity of the exercise has been upheld in language and on reasoning which, I am satisfied, sustains the validity of the 1966 Amendments. Because it on this aspect of the case that the States most vigorously attack the

validity of the 1966 Amendments, I am constrained to discuss these authorities fully.

Since the States are most vociferious in conjuring up the possible "horribles" of an adverse adjudication to them,[17] it is necessary, at the outset, to define what is — and what is not — presently before us. Before me is only the question of whether Congress may prescribe minimum wages and overtime for non-executive, non-professional and non-administrative employees of private and public hospitals, schools and related institutions. Congress has singled out this group which, experience has proved, is often underpaid and subjected to unreasonable work schedules and has required that its members be paid a minimum sum which, measured by the standards of contemporary society, is deemed a decent wage and that they not be compelled to work longer hours in a work period without payment of overtime than, by those standards, are deemed proper. These standards have been made applicable to private and public employees, alike. Congress has *not* sought to cover doctors, nurses, principals, teachers, research assistants, or the like. Nor has Congress sought to cover the governors, attorneys general, legislators, judges or policemen, who, some of the States assert, could eventually be covered if we upheld the validity of the 1966 Amendments.

Our consideration of the constitutional issue presented here cannot deal with hypothetical projections by the States of regulations yet to come. Our consideration of the States' contention that their sovereignty is impaired, and my conclusion that the 1966 Amendments are valid and constitutional, are limited to the 1966 Amendments and only those employees to which they extend, as are my previous conclusions that the power to regulate under the commerce clause exists and that the enterprise concept is constitutional. No court, and in particular no lower federal court, should attempt to adjudicate that which is not justiciable; all must steadfastly follow the rules set down by the Supreme Court governing the process of constitutional adjudication:

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[17] See *New York v. United States*, 326 U.S. 572, 583-584 (1946).

"The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power — 'the gravest and most delicate duty that this Court is called on to perform.' Marbury v. Madison (US) 1 Cranch 137, 177-180, 2 L. ed. 60, 73, 74. *This Court, as is the case with all federal courts, has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.* In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' * * * Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. * * * In Barrows v. Jackson, 346 U.S. 249, 97 L. ed. 1586, 73 S. Ct. 1031, this Court developed various reasons for this rule. Very significant is the incontrovertible proposition that it 'would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.' Id. 346 U.S. at 256. *The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.* (emphasis supplied; footnote eliminated) *United States v. Raines*, 362 U.S. 17, 20-22 (1960).[18]

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[18] Although one of the best expressions of judicial self-restraint in the process of constitutional adjudication, *United States v. Raines*, *supra*, does not stand alone. It is only one of a line of decisions

As a first step in the decision of the limited question before me, it is necessary to put to rest any argument based upon the Tenth Amendment, as such. The Tenth Amendment is but a "truism" — "that all is retained which has not been surrendered." *United States v. Darby, supra,* at p. 124. Besides stating this self-executing formula, the decided cases are clear that the Tenth Amendment neither adds to nor detracts from the essential question to be decided in this case. *United States v. Sprague,* 282 U.S. 716, 733-734 (1931); *United States v. Appalachian Electric Power Company,* 311 U.S. 377, 428 (1940); *Oklahoma ex rel Phillips v. Guy F. Atkinson Co.,* 313 U.S. 508, 534 (1941); *Fernandez v. Wiener,* 326 U.S. 340, 362 (1945); *Case v. Bowles,* 327 U.S. 92, 101-103 (1946); *United States v. Oregon,* 366 U.S. 643, 649 (1961).

I turn directly to the cases where federal regulation under the Commerce Clause has been upheld, even when applied to an "essential" state activity. The principal authorities which must be considered are *Samitary District v. United States,* 266 U.S. 405 (1925); *Board of Trustees v. United States,* 289 U.S. 48 (1933); *Case v. Bowles,* 327 U.S. 92 (1946); and the four related cases of *United States v. California,* 297 U.S. 175 (1936); *California v. United States,* 320 U.S. 577 (1944); *California v. Taylor,* 353 U.S. 553 (1957); and *Parden v. Terminal R. of Alabama Docks Dept.,* 377 U.S. 184 (1964). Also of interest, because it posed an issue of state sovereignty dispositive of this litigation, is *United States v. Ohio,* 385 U.S. 9 (1966).

The oldest and one of the most important cases is the *Sanitary District* case. This was a suit by the Attorney

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developing the concept which it so eloquently states: *Flint v. Stone Tracy Co.,* 220 U.S. 107 (1911); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 347 (1936) (concurring opinion, Brandeis, J.); *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450 (1945); *United Public Workers v. Mitchell,* 330 U.S. 75 (1947); *United States v. Spector,* 343 U.S. 169 (1952); *International L. & W. Union v. Boyd,* 347 U.S. 222 (1954). Additional authorities are cited in the portion of the opinion in *United States v. Raines, supra,* from which the quotation is extracted.

General of the United States to enjoin the Sanitary District of Chicago from diverting a volume of water from Lake Michigan in excess of that allowed by federal statute, although a state statute set a higher limit. The federal government asserted the taking to conflict with the power of Congress to regulate interstate and foreign commerce, and with a treaty with Great Britain concerning boundary waters of the Dominion of Canada; the Sanitary District defended on the grounds, *inter alia*, that public health required the taking of the additional quantity of water in accordance with the state statute, because otherwise it would be impossible to carry the city's sewage downstream.

Mr. Justice Holmes, speaking for a unanimous Court, held that the injunction should issue. He declared, basing the right to relief on the power of the federal government to regulate interstate and foreign commerce:

> "The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. *There is no question that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants.* In matters where the states may act, the action of Congress overrides what they have done." (Emphasis supplied.) *Id.*, at p. 426.

Following this he recited the evidence in detail, including that which clearly showed the sanitary needs of Chicago for the additional water, and concluded the opinion by stating:

> "* * * a large part of the evidence is irrelevant and immaterial to the issues that we have to decide. Probably the dangers to which the city of Chicago will be subjected if the decree is carried out are exaggerated; but, *in any event, we are not at liberty to consider them here as against the edict of a paramount power.*" (Emphasis supplied.) *Id.*, at p. 432.

Maryland argues that Chicago did not need the water for an "essential state function," but I conclude it difficult

to think of something more essentially sovereign or necessary to the welfare of the State and its people than sewage disposal; sewage disposal is as much a part of public health as hospitals for contagious diseases, and hospitals for the mentally ill. Yet, the Court stated in this context that when Congress exercised its power over interstate and foreign commerce, the welfare or needs of the inhabitants of the State *could not even be considered.* Maryland also argues that the case is distinguishable because it concerned a direct burden on commerce. The answer is that Congress has found that substandard wages and non-payment of overtime are also burdens on commerce and this finding has been judicially approved. *United States v. Darby, supra.*

Board of Trustees v. United States, supra, was a case in which the alleged conflict between the exercise of the power of Congress to regulate commerce and the concept of state sovereignty arose where the State was exercising its sovereignty to provide higher education. The University of Illinois imported scientific apparatus for use in one of its educational departments, and it sued to obtain a refund of duties exacted on the importations. For a unanimous Court, Chief Justice Hughes held that the power of the federal government over goods moving in foreign commerce is plenary, that the State in the preformance of state functions might not limit the exercise by Congress of its power, and that the duties were properly laid.

In arriving at this result, the Court recognized that the federal government has the power to tax, including the power to lay duties, and that it has the power to regulate commerce. The existence of the taxing power was stated not to foreclose Congress from laying duties in the exercise of its power to regulate commerce, and the Court concluded that the duties in question were laid in the exercise of the power to regulate commerce and not in the exercise of the taxing power. Having reached that conclusion, the Court then dealt with the argument that in the exercise of the commerce power, Congress was limited by notions of state sovereignty as it was when it exercised its taxing power:

"The principle invoked by the petitioner, of the immunity of state instrumentalities from Federal Taxation, has its inherent limitations. * * * It is a principle implied from the necessity of maintaining our dual system of government. * * * Springing from that necessity it does not extend beyond it. Protecting the functions of government in its proper province, the implication ceases when the boundary of that province is reached. The fact that the State in the performance of state functions may use imported articles does not mean that the importation is a function of the state government independent of federal power. The control of importation does not rest with the State but with the Congress. *In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power. There is thus no violation of the principle which petitioner invokes, for there is no encroachment on the power of the State as none exists with respect to the subject over which the Federal power has been exerted.* To permit the States and their instrumentalities to import commodities for their own use, regardless of the requirements imposed by the Congress, would undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create. *It is for the Congress to decide to what extent, if at all, the States and their instrumentalities shall be relieved of the payment of duties on imported articles.*" (Emphasis supplied.) *Id.*, at p. 59.

Significant also for the case at bar, is the earlier statement of the Court in which it described the power of Congress over interstate and foreign commerce:

"It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action. * * *.

"* * * *The principle of duality in our system of government does not touch the authority of the Congress in*

the regulation of foreign commerce." (Emphasis supplied.) *Id.*, at pp. 56-57.

Maryland seeks to escape the language in this opinion by the apparent argument that the case involved Congress' power over foreign commerce and the express argument that the power of Congress over commerce would not be limited if recognition were given to state sovereignty over public schools and hospitals. Of course, the Court was writing in the field of foreign commerce, but the power of Congress over foreign commerce is no more plenary and no more exclusive than its power over commerce between the states, the latter including the power to regulate local activities which have a substantial effect on interstate commerce. *Wickard v. Filburn, supra.* The States lack any power to regulate commerce as such; it follows that there can be no interference with state sovereignty over interstate commerce because none exists. Where Congress had extended the Act to certain employees of public schools and hospitals, to hold that Congress may not validly do so necessarily limits the power of Congress. The opinion's specific and peremptory rejection of the assertion that "state functions" can isolate a state or its instrumentalities from federal regulation surely goes a long way to support the validity of the 1966 Amendments. The specific and peremptory rejection of the argument that the principle of duality in our system of government may limit in any way the authority of Congress to regulate commerce is dispositive of the present case.

Case of Bowles, supra, only repeats the clear implications of the *Sanitary District* and *Board of Trustees* cases. In *Case,* a suit for injunction was brought to restrain the State of Washington from selling timber on school lands at prices in excess of those fixed by regulation adopted under the Emergency Price Control Act. The State alleged, in defense of the action, that price controls could not be applied to it because the sale was "for the purpose of gaining revenue to carry out an essential governmental function — the education of its citizens." *Id.*, at p. 101.

This argument was rejected and price controls held applicable to the State in the following language:

"We now turn to petitioner's Constitutional contention. Though as we have pointed out petitioners have alleged that the Act applied to setting a maximum price for school-land timber violates the Fifth and Tenth Amendments, the argument here seems to spring from implications of the Tenth Amendment only. *The contention rest on the premise that there is a 'doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.'* It is not contended, and could not be under our prior decisions, that the ceiling price fixed by the Administrator is Constitutionally invalid as applied to privately owned timber. * * * Nor is it denied that the Administrator could have fixed ceiling prices if the state had engaged in a sales business 'having the incidents of similar enterprises usually prosecuted for private gain.' * * * But it is argued that the Act cannot be applied to this sale because it was 'for the purpose of gaining revenue to carry out an essential governmental function — the education of its citizens.' Since the Emergency Price Control Act has been sustained as a Congressional exercise of the war power, *the petitioner's argument is that the extent of the power as applied to state functions depends on whether these are 'essential' to the state government. The use of the same criterion in measuring the Constitutional power of Congress to tax has proved to be unworkable, and we reject it as a guide in the field here involved.*" (footnote eliminated; emphasis supplied.) *Id.* at p. 101.

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"Where as here, Congress has enacted legislation authorized by its granted powers, and where at the same time, a state has a conflicting law which but for the Congressional Act would be valid, the Constitution marks the course for courts to follow. Article

VI provides that 'The Constitution and the Laws of the United States * * * made in pursuance thereof * * * shall be the supreme Law of the Land * * *.'" (footnote eliminated) *Id.*, at pp. 102-103.

Case v. Bowles, may not be summarily rejected, as it is by Maryland, on the ground that "the real sovereignty of the State was not infringed" and the case arose under the war power of Congress. The power of Congress to regulate commerce is no less plenary and no less exclusive than the power to make war under which the Emergency Price Control Act was adopted. While price limitation on the sale of timber to support public education, in degree, might be less discommoding than fixing wages of certain state employees, the Court's rejection of the "essential" functions argument is of extreme significance; the rejection goes to the very heart of this case.

The line of cases beginning with *United States v. California, supra*, may appear to be distinguishable from the instant case on the ground that each involved state activities which do not fall within the concept of essential governmental functions. Yet the essential nature of the state activity and the sovereignty of the state was interposed as a defense in each of them and rejected by the Court, not on the ground that the activity was not essential but on the ground that the "essential" concept was not a good defense. Thus, the cases are additional authority for concluding that the States' argument here is lacking in merit.

In *United States v. California* the question was whether a terminal railroad owned and operated by a State for the purpose of facilitating the commerce of a port, all of the revenues of which were used to improve port facilities, could be subjected to the Federal Safety Appliance Act, so that the penalty prescribed by that Act for its violation could be recovered from the State of California.[19]

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[19] It is interesting that in an earlier suit, *Sherman v. United States*, 282 U.S. 25 (1930), involving the same belt railroad, Mr. Justice

California urged these activities were not subject to the Act because "* * * it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement * * * it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act." *Id.*, at p. 183. Mr. Justice Stone (later Chief Justice), speaking for a unanimous Court, specifically rejected this argument and sustained the imposition of the penalty, stating:

> "* * * we think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity. That in operating its railway it is acting within a power reserved to the states cannot be doubted. * * * The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. * * * In each case the power of the state is subordinate to the constitutional exercise of the granted federal power." *Id.*, at pp. 183-184.

In addition to announcing the absolute supremacy of the power of Congress to exercise its authority to regulate commerce despite the defense of state sovereignty, the Court rejected an argument that the commerce power is circumscribed by state sovereignty, as is the taxing power. It said:

> "The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is

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Holmes said: "California has not gone into business generally as a common carrier, but simply has constructed the Belt Line as an incident of its control of the harbor — a state prerogative." *Id.*, at p. 29.

implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power * * * which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditonally within it. * * * Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. *But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.*" (Emphasis supplied.) *Id.*, at pp. 184-185.

In *California v. United States, supra,* an order of the United States Maritime Commission requiring elimination of preferential and unreasonable practices, i.e., excessive free time and non-compensatory charges for services, was held enforceable against the State of California and the Board of State Harbor Commissioners for San Francisco Harbor. California defended its non-compliance with the order on the ground that the Act under which it was issued had no application to public owners or wharves and piers. This question of statutory construction was decided against its contention, with the Court adding:

"* * * it is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade as the activities and instrumentalities which were here authorized to be regulated by the Commission, whether they be the activities and instrumentalities of private persons or of public agencies." *Id.*, at p. 586.

The belt railway which was the subject of litigation in *United States v. California, supra,* was also the subject of litigation in *California v. Taylor, supra.* In the latter the

question was whether the Railway Labor Act was applicable to the *employer-employee relationship* between the State of California and its employees engaged in operating the railroad. Notwithstanding that California provided that its employees had no right to bargain collectively with it concerning terms and conditions of employment, the Railway Labor Act was held applicable on the principle that a state may not prohibit the exercise of rights which the federal labor relations acts protect. As in the earlier cases, California asserted the Act, if held to apply to it, invalidly interfered with its sovereign immunity, but the Court rejected this contention, saying:

> "Finally, the State suggests that Congress has no constitutional power to interfere with the 'sovereign right' of a State to control its employment relationships on a state-owned railroad engaged in interstate commerce. In United States v. California (U.S.) supra, this Court said that the State, although acting in its sovereign capacity in operating this Belt Railroad, necessarily so acted 'in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government.' 297 U.S., at 184. 'California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers. . . .' Id. 297 U.S., at 185. That principle is no less applicable here. In California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships." *Id.*, at p. 568.

A similar result was reached in *Parden v. Terminal R. of Alabama Docks Dept., supra*, where Alabama's plea of sovereign immunity was rejected in a suit brought against it under the Federal Employer's Liability Act by an employee of a railroad which it owned and operated. The decision proceeded on the dual grounds that when Congress was empowered to regulate commerce, the States neces-

sarily lost any portion of their sovereignty that would stand in the way, and that Alabama waived its protection against suit by an individual, as embodied in the Eleventh Amendment, by operating an interstate railroad approximately twenty years after enactment of the Federal Employers' Liability Act.[20]

In *United States v. Ohio, supra,* the question was whether the State of Ohio was liable to the United States for penalties under the Agricultural Adjustment Act of 1938 for growing wheat on state-owned farms in excess of federally-imposed acreage allotments. Specifically, the wheat was grown on a prison farm as part of a program of individual therapy and rehabilitation. It was consumed exclusively on the farm; indeed, by the Ohio Constitution it could neither be "sold, farmed out, contracted or given away." The Sixth Circuit Court of Appeals held that the growing of wheat and consumption of the crop by the inmates of the institution could not have any substantial effect on interstate commerce and, hence, that the Act was inapplicable. 354 F. 2d 549 (1965). The judgment was summarily reversed in a *per curiam* opinion on the authority of *Wickard v. Filburn, supra.*

The *Ohio* case had present all of the factors relied on here by the States to invalidate the 1966 Amendments.

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[20] Three decisions of United States Courts of Appeals in this area are worthy of note. *United States v. Feaster,* 330 F. 2d 671 (5 Cir. 1964), held that the National Mediation Board, acting under the Railway Labor Act, could require the state agency which operated state-owned dock facilities to produce its employment records for inspection by a union. In *State of Colorado v. United States,* 219 F. 2d 474 (10 Cir. 1954), it was held that Colorado State Board of Stock Inspection was subject to the registration requirements of the Packers and Stockyards Act, and to the payment of penalties under the Act, "the same as are private persons or agencies," notwithstanding that inspection was conducted "in its sovereign capacity as a state." *Id.,* at p. 477. The most recent decision in this regard is *N.L.R.B. v. Local 254, Building Service Employees International Union,* ___ F. 2d ___ (1 Cir. 4/10/67), holding that for purposes of the National Labor Relations Act the Department of Education of the State of Massachusetts was "a person engaged in commerce" and "an employer" as defined in the Act.

Nothing could be more essential or a more sovereign governmental function than providing places of detention for those convicted of crimes. The performance of such a state function neither produces income nor competes with any private enterprise. Likewise, it is a function which can in no way be provided by private enterprise. The case was decided by the Court of Appeals on the commerce issue without reaching the asserted issue of impairment of state sovereignty and we are advised that in the briefs presented to the Supreme Court the latter contention was not made. While the case is conclusive authority for determination of the scope of the power of Congress to regulate commerce, it is not necessarily determinative on the issue of impairment of state sovereignty.

In asserting boundaries to federal regulation under the Commerce Clause, the States claim support for the result they advocate in *New York v. United States*, 326 U.S. 572 (1946), and other cases which have held the power of Congress to tax is subject to limitation. It should be noted at the outset that in the *New York* case there was no opinion of the Court, and reliance is placed upon one of the opinions concurred in by only four justices. But the weakness of this authority lies not in the lack of unanimity of the Court, but rather in the fact that other decisions before and after *New York* establish that an unqualified analogy between the taxing power and the commerce power cannot be made. Parenthetically, it should also be noted that in *New York* the claim of state sovereignty was rejected and the validity of the tax upheld. The *Sanitary District* case, *supra*, decided in 1925, and *Board of Trustees v. United States*, decided in 1933, clearly imply that Congress's power to regulate commerce and Congress's power to tax are not coterminus. *Case v. Bowles*, decided the same term as, but after, *New York v. United States*, specifically rejects limitations on the war power such as were suggested on the taxing power by dictum in some of the opinions in the *New York* case. On the other hand, when the power of Congress to regulate commerce is being considered, *United States v. California*, decided ten years before the *New York* case, is specific in saying that the test of validity of

regulation under the Commerce Clause is different from the test of the validity of federal taxation touching upon state sovereignty. See also, *United States v. Kahriger*, 345 U.S. 22 (1953).

These cases demonstrate that the taxing power and the commerce power have been viewed by the Supreme Court as having different limitations, because of the concurrent nature of the former, and the plenary nature of the latter. In sharp contrast, stand the statements of the Court that the power of Congress over war and over commerce, both foreign and interstate, are plenary. Because each is plenary, the war and commerce powers of Congress are necessarily coterminus, and *Hopkins Federal Sav. & L. Assn. v. Cleary*, 296 U.S. 315, 343 (1935), so suggests. Thus, cases decided under any of the plenary powers are precedents for similar situations arising under one of the other plenary powers, while cases decided under the taxing power are weak authority for determining the limits of the exercise of a plenary power. While an attempt is made to distinguish *Case v. Bowles* on the grounds that it concerned the war power, and to distinguish the *Board of Trustees* case on the grounds that it concerned the power to regulate foreign commerce, patently, these powers are plenary, coterminus and indistinguishable from the power to regulate interstate commerce. Indeed, while asserting that the cases are distinguishable, the States fail to cite one case holding that these powers are not equally plenary and coterminus; at the same time, the States fail to cite one case holding that the commerce power is restricted to the same area as the taxing power.

Hopkins Federal Sav. & L. Assn. v. Cleary, 296 U.S. 315 (1935), urged on the Court by the States, should also be noticed. In the *Hopkins* case, a federal statute which permitted state building and loan associations to become federal building and loan associations without state consent was held invalid. The Congressional power under which the statute had been adopted was deemed by the Court to be concurrent with a similar state power. As a consequence, the Court, consonant with its approach in taxing cases, where *concurrent* powers were also involved, drew a line

between federal and state sovereignty in holding that the statute unconstitutionally transgressed state sovereignty, but in doing so, it was careful to state: *"We are not concerned at this time with the applicable rule in situations where the central government is at liberty (as it is under the Commerce Clause when such a purpose is disclosed) to exercise a power that is exclusive as well as paramount."* (Emphasis supplied.) *Id.*, at p. 338. Thus, not only does the *Hopkins* case *not* constitute authority for the contention urged by the States, but the care with which the Court delineated the problem before it strongly suggests a contrary result had the legislation been an exercise of the power of Congress to regulate commerce. It is at most additional authority for the result I would reach.

The States, in the stipulations which we earlier mentioned, have presented extensive evidence to show the far-reaching financial impact on them of the 1966 Amendments. The proof tends to show that the graduated financial burden, resulting from escalation of the minimum wage and contraction of maximum hours without payment of overtime over a period of years, will necessitate either increased taxes or a curtailment of essential services. There is before us evidence that current budgetary appropriations will be insufficient to meet the increased costs resulting from the 1966 Amendments during the current fiscal period, and that in many instances, political subdivisions, restricted by organic la wto maximum limits of taxation and borrowing, are currently operating at these maxima so that, absent ganic law to maximum limits of taxation and borrowing, be required to curtail the amounts spent for teachers, text books and the like, or reduce the number of people served, if they are required to comply with the 1966 Amendments.

As I said earlier, this data is not excluded on evidentiary principles. It is properly before us — if only to put flesh on the skeletal frame of this litigation. But, in the decision of the constitutional issues presented to us, it, and the arguments of unconstitutional impairment of state sovereignty predicated upon it, are largely irrelevant. I have concluded that the 1966 Amendments are valid and constitutional, as is the enterprise concept of the 1961 Amend-

ments, and that there is no unconstitutional impairment of the sovereignty of the plaintiff States. The financial impact of the 1966 Amendments on the States is an argument to be addressed to Congress and not to the courts. As Chief Justice Marshall authoritatively stated in *Gibbons v. Ogden*, 9 Wheat. 1 (1824):

> "If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. *The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.*" (Emphasis supplied.) *Id.*, at p. 197.[21]

Even more specific in stating the principle that the financial impact of the 1966 Amendments is no guide to their validity is *Oklahoma ex rel Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941). In that case, the federal government planned to flood certain lands belonging to Oklahoma. The state sought an injunction, arguing, *inter alia*, that the project as planned would take much land unncessarily, without serving the purpose of the dam. The Court declared:

> "Such matters raise not constitutional issues but questions of policy. They relate to the wisdom, need, and

[21] The vitality of the principle announced has not been eroded by time. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964); *Polish Alliance v. N.L.R.B.*, 322 U.S. 643, 650 (1944); *Oklahoma ex rel Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 527-528 (1941); *Sanitary District v. United States*, 266 U.S. 405, 432 (1925).

effectiveness of a particular project. They are, therefore, questions for the Congress not the courts. * * * *Nor it is for us to determine whether the resulting benefits to commerce as a result of this particular exercise by Congress of the commerce power outweighs the costs of the undertaking.*" (Emphasis supplied.) *Id.*, at pp. 527-528.

To a further allegation that tax revenues of Oklahoma would be diminished because of loss of property taxes on the seized land, and the public education might be hampered because certain school buildings, on the condemned land, would have to be rebuilt elsewhere, the Court said:

> "*The possible adverse effect on the tax revenues of Oklahoma as a result of the exercise by the federal government of its power of eminent domain is no barrier to the exercise of that power.*" (Emphasis supplied.) *Id.*, at p. 534.[22]

I conclude that defendants' motion for summary judgment should be granted, but in view of the fact that my conclusions are shared only in part by Chief Judge Thomsen, and not at all by Judge Northrop, counsel may present a form of decree declaring the minimum wage provisions of the 1966 Amendments valid and constitutional and denying plaintiffs' prayers for injunctive relief.

HARRISON L. WINTER,
United States Circuit Judge.

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[22] Although not as explicit, several of the authorities discussed in the text support the rule that when the commerce power is exercised the test of validity of the exercise is *not* the cost to the States. In *California v. Taylor, supra,* the State was exposed to payment of the higher wages for state employees arrived at as a result of collective bargaining rather than the scale prescribed by state fiat. The result of the decision in *United States v. Ohio, supra,* would be presumably to increase the state's cost for wheat and flour supplies purchased from the market place rather than grown on the prison farm. In *Case v. Bowles, supra,* price controls on the sale of timber decreased school revenues so that services would have to be reduced or school taxes increased. The penalties exacted in *United States v. Ohio, supra,* and *United States v. California, supra,* represented a diminution of general state revenues otherwise available to support other state activities.

THOMSEN, Chief Judge, concurring in part:

I agree with the conclusion reached by Judge Winter — that the injunction requested by plaintiff should be denied — but for somewhat different reasons and with one important reservation. I agree that the operation of schools and hospitals by the several States and their subdivisions affects interstate commerce to a substantial degree, whether or not such operations themselves constitute interstate commerce, and that use of the "enterprise concept" does not itself render unconstitutional the 1966 Amendments to the Fair Labor Standards Act. The potential Eleventh Amendment problems, suggested by the States, should be considered as they may arise in subsequent actions against the several States. But I cannot agree that the power of the federal government to regulate essential sovereign functions of the States is absolute and unqualified, despite the broad language of the opinions cited by Judge Winter.

When the thirteen sovereign States adopted the Constitution they gave up only part of their sovereignty to the United States of America. The system created by the Constitution was and is a federal system; the States are not administrative divisions of a central government. For reasons which were reviewed by Judge Wisdom in *United States v. Manning*, W.D. La., 215 F. Supp. 272 (1963), and are not disputed, the Tenth Amendment was adopted in 1791. To characterize that Amendment as a "truism" does not mean that it was intended to be devoid of meaning, lulling the States into acceptance of a national government which may, without further amendment to the Constitution, take away from the States the substance, if not the trappings, of the sovereignty which they intended to preserve. The Tenth Amendment makes explicit the principle of federalism, which recognizes the supremacy of the federal government with respect to the powers delegated to it, but also recognizes that the States retained certain sovereign powers. The sovereign powers retained by the States are not specified in the Tenth Amendment or in any other provisions of the Constitution; they are limited

only by the scope and thrust of the powers delegated to the federal government.

The power to regulate interstate commerce delegated to the federal government has been held to be "plenary" and has been accorded a very wide range by the Supreme Court. The cases in which the extent of the commerce power has been discussed in relation to the Tenth Amendment fall into two categories: those in which the regulation was being applied to and challenged by a party other than a State or a political subdivision, and those in which the regulation was being applied to and challenged by a State itself or by a political subdivision of a State.

In the first category, the pendulum has swung away from decisions[1] which restricted the commerce power. Since 1937 the Supreme Court has consistently held that the federal regulatory power under the commerce clause may control intrastate activities which merely affect commerce.[2]

The cases involving federal regulation of activities engaged in by the States or their subdivisions have been analyzed in Judge Winter's opinion. Some of them involved the competing interests of several States,[3] the treaty power,[4] the power over foreign commerce,[5] or the war power.[6] Others involved the operation by a State of a

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[1] *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

[2] *United States v. Darby*, 312 U.S. 100 (1941); *N.L.R.B. v. Jones & Laughlin*, 301 U.S. 1 (1937); see also *Wickard v. Filburn*, 317 U.S. 111 (1942); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

[3] *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

[4] *Sanitary District of Chicago v. United States, supra.*

[5] *Board of Trustees of University of Illinois v. United States.* 289 U.S. 48 (1933).

[6] *Case v. Bowles*, 327 U.S. 92 (1946).

railroad,[7] a waterfront terminal[8] or the dominion which the federal government has, "to the exclusion of the states," over navigable waters of the United States.[9] The opinions in some of those cases state the power of the federal government over interstate commerce in broad and unqualified terms, indicating that when Congress exercises its power over interstate commerce, the welfare or needs of the States need not even be considered. The broad language of the opinons must, however, be read in the context of the cases in which they were rendered. In none of those cases were the essential taxing and budgetary functions of the States so seriously affected as they are by the statute under consideration. We must heed the admonition in *Gomillion v. Lightfoot*, 364 U.S. 339, at 343-344: "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretative process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts."

The question remains: Does the principle of federalism, implicit in the Constitution as originally drawn, and made explicit by the Tenth Amendment, prevent Congress from regulating, in the manner provided by the 1966 Amendments, the operation of public schools and hospitals by the States and their subdivisions?

The States cite a number of cases arising under the taxing power, to the effect that the taxing power is subject to limitations imposed by the principle of federalism, and argue that similar limitations apply to the commerce power. Limitations on the taxing power have been recognized when the exercise of that power would unduly inter-

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[7] *United States v. California*, 297 U.S. 175 (1936); *California v. Taylor*, 353 U.S. 553 (1957); see also *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964).

[8] *California v. United States*, 320 U.S. 577 (1944).

[9] *City of Tacoma v. Taxpayers*, 357 U.S. 320 (1958); *State of Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

fere with the governmental activities of the States.[10] "This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system." *Indian Motorcycle Co. v, United States,* 283 U.S. 570, 575 (1931). [11] The States argue that the reach of the commerce power is no greater than the reach of the taxing power, citing a statement from one of the opinions in *New York v. United States,* 326 U.S. 572, 582 (1946): "Surely the power of Congress to lay taxes has impliedly no less a reach than the power of Congress to regulate commerce." It must be recognized, however, that a limitation has been placed upon the taxing power which has not yet been placed upon the commerce power.

In another opinion in *New York v. United States,* Chief Justice Stone, concurring for himself and three other Justices, stated:

> "* * * we are not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individuals alike. * * * [A] federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government. * * *" 326 U.S. at 586-587.
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> "The problem is not one to be solved by a formula, but we may look to the structure of the Constitution as our guide to decision. * * *" 326 U.S. at 589.

The limitation on the taxing power — undue interference with a State's performance of its sovereign functions of government — responds to Chief Justice Marshall's famous dictum: "The power to tax involves the power to destroy". *McCulloch v. Maryland,* 4 Wheat. 316, 431

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[10] *Graves v. New York ex rel. O'Keefe,* 306 U.S. 466, 477, 478 (1939).

[11] See also *New York v. United States,* 326 U.S. 572, 577 (1946); *Willcuts v. Bunn,* 282 U.S. 216 (1931).

(1819). The potentially destructive power of taxation lies in the ability of one sovereign to impose an economic burden upon the functions of the other too great to be borne, thereby curtailing or eliminating a particular activity.

Taxation is not the only way in which the federal government may destroy or cripple essential State functions. There must be some limit beyond which the federal government cannot go in its attempt to exercise against the States themselves the power of the federal government over interstate commerce. Neither the Solicitor of Labor, who argued the case for all the defendants, nor Judge Winter in his opinion, denies that there may be some limit, but they argue and hold respectively that whatever limit there may be has not been exceeded in this case.

The proper limit is indicated, though not fixed, by the statement of Chief Justice Stone, quoted above, that "a federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." The attempted exercise against a State of the power of the federal government over interstate commerce should face the test: does it interfere unduly with the State's performance of its sovereign *and indispensable* functions of government? If the concept of federalism is to survive, it must stand on constitutional limitations, not on the sufferance of the federal government.

When the federal government invokes the commerce power, unaided by the Fourteenth Amendment or any other constitutional provision, to regulate the relations between a State and state employees who are not themselves engaged in interstate commerce or in the production of goods for commerce, the Court should consider a number of factors in determining the constitutionality of the proposed regulation. The Court should give weight and deference to any congressional findings with regard to the effect which the action sought to be regulated has on interstate commerce. The Court should also consider whether

the activity subject to the proposed regulation is an important function of the State and its political subdivisions; whether the service in question is offered or might be offered to the same extent and on substantially the same terms by private enterprise or other non-state sources; and whether such regulation would seriously interfere with the State's performance or regulation of its indispensable sovereign functions.

The statute enacting the 1966 Amendments contains no congressional findings with respect to the relationship between interstate commerce and the proposed coverage of state employees.[12]

The operation of public schools and hospitals is undoubtedly one of the most important functions of State governments. The Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), stated flatly: "Today, education is perhaps the most important function of state and local governments." The importance of public hospitals to the community is also beyond dispute.

Public hospitals in many instances provide service otherwise unavailable.[13] The public schools and hospitals could

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[12] Findings with respect to labor conditions in industries engaged in commerce or in the production of goods for commerce, were included in the original Fair Labor Standards Act, see 29 U.S.C.A. 20,2(a).

[13] In Maryland 867 beds, all publicly owned and operated, constitute the total facilities for tubercular care in the State of Maryland. A similar situation exists in Texas. Under Texas law, on the discovery of tuberculosis the patient can be committed to a state hospital until the disease is no longer communicable. But non-state hospital beds for tubercular patients are virtually non-existent and the few that are available are extremely expensive. Similarly, approximately 90% of the facilities for the mentally disturbed and mentally retarded in Maryland are provided by the State, and, undoubtedly, much the same proportion applies in other States. Moreover, it is the public hospital which bears the main burden of providing care for the indigent. In Texas, for example, most of the people in State mental institutions are charity or near charity patients. In the Texas tubercular hospitals only nine out of 2,900 patients paid for the complete cost of their hospital care in 1966. The necessity of keeping

not be replaced by nongovernmental enterprises.[14] The alternative would be federal schools and hospitals, and no one has argued for that.

From the mass of evidence submitted to the Court pursuant to stipulation, it is clear that the impact of the 1966 Amendments on the States is far-reaching. The Act imposes upon the States a graduated financial burden, which will necessitate either increased taxes or a curtailment of the services now being rendered by the States and their political subdivisions. Most of the States must operate out of current funds provided by budgetary appropriations,[15]

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the mentally disturbed and those ill with communicable diseases away from the community at large is too obvious to require elaboration.

[14] In Maryland approximately 80% of the total number of secondary and elementary school students are enrolled in public schools. In Texas and Ohio the comparable figures are approximately 86% and 84% respectively. The great majority of the other schools are either parochial or religiously affiliated. In Maryland public institutions of higher education served 74% of the students enrolled toward degree credit. In Texas and Ohio the comparable figures were 77% and 63% respectively. In 1965 over half the hospital beds in Maryland were located in hospitals operated by State and local governments. It is true, as defendants note, that these hospitals accounted for only 15% of the total admissions, but that figure reflects their role in treating the chronically ill and long-term mental and tubercular patients. In Texas, State hospital beds account for almost half the total number of beds in all Texas hospitals, and for about 25% of the admissions. State and local government hospitals in Ohio provided almost half the total number of hospital beds in the State and accounted for about 15% of the admissions.

[15] Thus, Texas represents to the Court that in order to meet the standards of the Fair Labor Standards Act the expenditures of the Texas Youth Council will be increased by over $3,000,000 annually; the Department of Mental Health and Mental Retardation will need an additional $7,500,000 annually; the cost of the Institutions of Higher Education will go up over $3,250,000 annually and the Fort Worth Independent School District will need by 1971 to find additional tax revenue sources for approximately $575,000 annually. Even though the Fort Worth District is one of the larger districts in the State, there are over 1,300 other Independent School Districts whose cost will be increased proportionately and who also must find additional sources of revenue. Many of these districts have reached their constitutional tax rate limit as well as property value limitations.

and in many instances the responsible political subdivisions, notably school districts, are taxing at their constitutional maximum and would have to curtail the amounts spent for teachers, textbooks and the like, or reduce the number of people served, unless and until the State constitution is amended.

Nevertheless, I cannot say that the minimum wage provisions interfere so *unduly* with the State's performance of their indispensable sovereign functions as to make those provisions unconstitutional. It is of course true, as Judge Northrop points out, that the minimum wage provisions interfere with the budgetary function of the States. But that interference must be weighed against the interest of the federal government, representing all the people of the United States, in seeing that all the people are paid an appropriate minimum wage. Serious problems are presented by the possible application of the Act to work done by inmates of correctional and other institutions as part of their education or rehabilitation programs, but I agree with the Solicitor of Labor that these can best be handled by the regulations or on a case by case basis, and do not justify a sweeping injunction.

The overtime provisions present a more serious problem. Unlike the minimum wage provisions, the overtime provisions are not limited to the lowest paid employees. Many State functions, including some which are affected by the 1966 Amendments, require work arrangements other than the standard 40-hour work week. Public school, college and university personnel, who generally receive lengthy vacations, must often work longer than 40 hours per week during some part of the school year. The statute under consideration makes some provision in this regard for the employees of hospitals, whose round-the-clock requirements do not fit comfortably into a 40-hour work week.[16] A common practice has been to give these and other State employees compensatory time, or to make various other budgetary arrangements to keep in fair balance State jobs of the most diverse character. If the overtime provisions

[16] 29 U.S.C.A. 207(j) (1966 Cum. Supp.).

of the 1966 Amendments are valid, many of those arrangements may no longer be possible. The Act will seriously hamper the organizational and budgetary functions of the States by forcing them to favor employees of their hospitals and schools over other programs such as welfare and law enforcement, unless the States rearrange their entire civil service and appropriate additional sums for employees not covered by the Act.

For reasons stated above, I am satisfied that a line must be drawn, and that with respect to some if not all state employees covered by the 1966 Amendments the overtime requirements of the Act probably go beyond the permissible limits. The interference with the organizational and budgetary functions of the States has been noted. On the other hand, Congress has not stated, and neither the committee hearings nor the stipulated facts in this case show, what if any effect on interstate commerce the overtime practices of the several States may have. The issue in each instance is whether the particular regulation *unduly* interferes with one or more indispensable sovereign functions of the State. This indicates that the question whether the application of the overtime provisions of the statute to state employees goes beyond the permissible limits should be decided in the context of particular cases, when the extent of the interference with an indispensable state function can be weighed against the effect, if any, which the State's overtime practices have on interstate commerce.[17]

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[17] At the hearing of this case the Solicitor of Labor argued for all of the defendants. He was asked from the Bench whether and where a line should be drawn. Without conceding that any line should be drawn in this case, and without withdrawing from his position that the plenary power of the federal government over interstate commerce applies to the States as well as to individuals, the Solicitor suggested: "* * * we have such a variety of situations that it may not be the path of wisdom to try to issue any blanket rule [to cover] the variety of different situations demonstrated [by the stipulations with respect to] Maryland, Ohio and Texas, and which can be assumed to exist in a multiplicity of cases throughout the fifty states." Tr. p. 193. The Solicitor concluded "that this is not the appropriate place and case for blanket injunctions or orders on a blanket basis so far as the application of this rule to schools

I conclude that a sweeping injunction at this time would not be proper.

The denial of relief in this case should be without prejudice to the right of the several States and their political subdivisions to challenge the overtime provisions of the Act applicable to employees of the States and their political subdivisions, in future cases presenting specific situations.

NORTHROP, District Judge, dissenting

I am compelled to dissent from the conclusions reached by Judge Winter and Judge Thomsen that this Act is not unconstitutional.

The majority recognizes that this is a case of first impression involving a conflict between Congress' power under the Commerce Clause and state sovereignty as recognized in our Constitution.

Judge Winter concludes that the power of Congress under the Commerce Clause has no boundaries and Congressional preemption in this field is supreme, it mattering not that it would destroy the constitutionally recognized sovereignty of the states. To put it simply, he holds that from the beginning federalism, as embodied in our Constitution, existed by the will of Congress rather than by the will of the people. No case has gone that far. It is supported neither by history nor by the structure of the Constitution.

In his concurring opinion, Judge Thomsen recognizes that there is implicit within the concept of federalism embodied in the Constitution a limitation on the power of

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and hospitals are concerned. Instead, it would seem most appropriate if such a new line were conceived and fashioned, if it should be, that the concept and the fashioning of it should not be for this Court, but by the Supreme Court in any later proceedings, or perhaps, as I have suggested several times before, it should be done as cases actually come up in the future and action is taken where we can get a full exposure of all of the different facts and facets on issues that may well be presented at that future time." Tr. pp. 204, 205.

Congress under the Commerce Clause. However, he feels that the minimum wage provisions of the Act as they affect the states do not transgress the limitation imposed by the Constitution upon Congress. But he expresses serious doubts as to the constitutionality of the overtime provision of the Act as it affects the states. Nevertheless he concludes that question is not yet ripe for adjudication. As to it, he would wait until the Department of Labor promulgates and applies its regulations to the states and decide constitutionality on a case-by-case basis.

Although I agree with Judge Thomsen's analysis of the pertinent cases and some of his reasoning as to the effect of the amendment on the states, I cannot agree with his conclusions. Unless the Department of Labor emasculates the Act, there will be no way for this or some other court to avoid the constitutional question posed herein.

The question before us is whether this Congressional exercise of power under the Commerce Clause constitutes an undue infringement upon the "performance of [the state's] function as a government which the Constitution recognizes as sovereign."

This quotation is from Chief Justice Stone's opinion in New York v. United States, 326 U.S. 572, at 588, 66 S. Ct. 310, at 317, in reference to the limits on the taxing power of Congress. Although it is recognized that the power under the Commerce Clause may be broader, it must have some limits. The language of Chief Justice Stone suggests such a limitation.

We are concerned here with the separation of powers between national and state government established by our Constitution. This concept of federalism has been carefully preserved throughout our history by the courts, not by exhorting the Congress on the one hand or the state legislatures on the other to restrain their actions so as not to trespass on the rights, responsibilities, and duties of the other.

I cannot agree that it is a political question for the state to importune the Congress not to raise the salaries of

state employees, thus forcing the state legislature to tax its people to pay those employees. This is a direct transgression on the concept of federalism, which must be determined by the courts. The case before us is a perfect example of the wisdom of Constitutional rather than Congressional federalism. The amendment, through which the states are subjected to the Fair Labor Standards Act, was enacted without notice to the states so that they might be heard and without any thought being given to the effect of the Act on them. Surely the statement of one Congressman, even in the committee of the whole, did not alert the states, or constitute a Congressional finding, or give this Act a purpose as applied to the states as the majority would wish. [Note 10, Judge Winter's opinion.]

This case then brings into confrontation the powers of Congress under the Commerce Clause with the concept of dual sovereignty or federalism as embodied in our Constitution, which is articulated in the Tenth Amendment.

The effect of this Act must be measured against the Constitution precisely and its impact cannot be softened by what regulation a department of the national government might promulgate in its application.

What then is its effect on the state government?

By this Act Congress is forcing under threat of civil liability and criminal penalties, the state legislature or the responsible political subdivision of the state

1. to increase taxes (an impossibility in some of the political subdivisions without a state constitutional amendment); or

2. to curtail the extent and calibre of services in the public hospitals and educational and related institutions of the state; or

3. to reduce indispensable services in other governmental activities to meet the budgets of those activities favored by the United States Congress; or

4. to refrain from entering new fields of governmental activity necessitated by changing social conditions.

The allocation of the state's revenue among government activities is the most important function of state government, for it determines the extent and calibre of service which a state can supply. State governments must provide services out of current tax funds. The state government and its political subdivisions are particularly sensitive to the needs of the people and their ability to pay for the indispensable governmental functions that must be furnished.

The budget is, therefore; under constant study by both the executive and legislative branches of the state's government. Not only does the appropriation bill demand the highest consideration of the legislature while it is in session, but it also requires most of the attention of the executive and the interim legislative committees between sessions.*

There is only so much revenue available. The wise allocation of this money demands this constant up-to-the-minute knowledge of state and local governmental officials intimately concerned with the requirements and priorities to be allotted among the health, welfare, education, law enforcement, urban, pollution, and other demanding governmental functions, each of substantial importance. The states' Congressional delegations neither have the time, nor knowledge, nor is it their function to become involved in the vital details of state fiscal policy.

Perhaps all of the above can be expressed more graphically by a recent news story in the Baltimore Sun, which undoubtedly is repeated hundreds of times across the nation:

"It is budget time again in Howard County. . . .

"What particularly worries the commissioners is that the school budget [the largest expenditure of the

* For example, consider the reports of the Maryland General Assembly's Committee on Taxation and Fiscal Affairs from 1955 to date, the Maryland Legislative Council's Report for any year and countless other such documents reflecting the prodigious amount of time and effort put forth by state officials to supply governmental services. These documents may be found in the Archives of the Council of State Governments.

county government] has gone up on an average of 22 per cent each year while the taxable income goes up only 15 per cent and assessments only 9 percent." The Evening Sun (Baltimore), April 6, 1967.

The impact of a mandatory allocation of state-collected revenues by Congress among the indispensable state governmental services is thus readily demonstrated. It amounts to the national government compelling state government action and controlling and operating the state government with little or no knowledge of the requirements of its citizens or the financial ability of those citizens to pay the bill.

The Congress, under the theory of this Act, can manipulate state governments by increasing the state functions to come under the "enterprise" concept or removing exemptions for classes of state employees at will without notice to the state, and all at the expense of the state. This Act is thus an intrusion of first magnitude into the functioning of state government now, is potentially without limit, and carries with it the formula for the destruction of the concept of federalism.

Congress has heretofore carefully avoided interjecting the national power into state or local governmental functions. Although grants-in-aid and matching funds might have that effect, these have a contractual basis — a far cry from mandatory direction. This Congressional reluctance in and of itself indicates a recognition of the Constitutional principle of federalism.

The careful nurturing of the concept of federalism has come to fruition since World War II in the increasing initiative of the states in meeting new problems brought about by the great social changes in our nation. The momentous "Metropolitan Problem" has caused the creation of new forms of local government in many of the affected areas. The wisdom of local administration has been clearly demonstrated. We are seeing many more governmental activities being undertaken by the federal and state governments on a recognized partnership basis

directed at solving our internal problems. In light of the above examples of voluntary movement toward national and state partnership, rather than compulsion, it would indeed be tragic at this point in history to expand and broaden the power of the federal government over the state governments in the exercise of their necessary governmental functions under the guise of the "Commerce Clause" to a point never heretofore reached by any decision. To substitute now the delayed and ponderous action of a remote central government would atrophy and stifle this progress.

Alexis de Tocqueville in his *Democracy in America* said it in this manner:

> ". . . I cannot conceive that a nation can live and prosper without a powerful centralization of government. But I am of the opinion that a centralized administration is fit only to enervate the nations in which it exists, by incessantly diminishing their local spirit. Although such an administration can bring together at a given moment, on a given point, all the disposable resources of a people, it injures the renewal of those resources. It may insure a victory in the hour of strife, but it gradually relaxes the sinews of strength. It may help admirably the transient greatness of a man, but not the durable prosperity of a nation." Vol. I, pp. 86-87 (Bradley ed., New York, 1946).

Thus, the limitation upon a power, which has been delegated to the federal government — including the power to relegate commerce among the states — and which deals with the internal affairs of this nation, is reached when Congress exercises that power so as to interfere unduly in some manner with the state's performance of an indispensable governmental activity. The Act as applied to employees of public schools, hospitals, and related institutions is unconstitutional because it is an undue infringement upon the performance of an indispensable and fundamental governmental function (its taxing and budgetary function) of the state, which the Constitution recognizes as sovereign.

The proof of the wisdom of the federal concept is implicit in the name of our government — the "United States". It cannot be said more succinctly.

JUDGMENT

(Filed June 26, 1967)

This cause having come on for final argument and the parties having agreed to present this case for final decision on a stipulated record; and the plaintiffs in their complaints having prayed for a declaratory judgment and a preliminary and permanent injunction; and the court having received argument and briefs from the parties; now therefore, this 26th day of June 1967, it is

ORDERED, ADJUDGED AND DECREED:

Plaintiffs' motion for summary judgment and prayers for interlocutory and permanent injunctive relief are denied for the reasons set forth in the opinions of the Court.

Accordingly, this action is dismissed without costs to either party.

/s/ HARRISON L. WINTER,
Circuit Judge.

/s/ ROSZEL C. THOMSEN,
District Judge.

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District Judge.

In The United States District Court
For The District of Maryland

Civil Action No. 18005

State of Maryland

Plaintiff

v.

W. Willard Wirtz, Secretary of Labor,
United States Department of Labor,
Clarence T. Lundquist, Administrator of the Wage
and Public Contracts Division of the United
States Department of Labor

and

William Hargadine, Jr., Regional Director, Third
Region, Wage and Hour and Public Contracts
Division, United States Department of Labor

Defendants

COMPLAINT FOR DECLARATORY JUDGMENT, TEMPORARY RESTRAINING ORDER AND INJUNCTION

The State of Maryland, on behalf of itself and its various departments, boards, commissions, agencies, and political subdivisions, Plaintiff, by Francis B. Burch, Attorney General of Maryland, Robert F. Sweeney, Deputy Attorney General, and Franklin Goldstein, Loring E. Hawes and Alan M. Wilner, Assistant Attorneys General, its attorneys, sues W. Willard Wirtz, Secretary of Labor; Clarence T. Lundquist, Administrator of the Wage and Hour and Public Contracts Division of the United States Department of Labor, and William Hargadine, Jr., Regional Director of the Third Region, Wage and Hour and Public Contracts

Division, United States Department of Labor, Defendants, and respectfully represents unto the Court:

1. This action is instituted to seek a declaratory judgment as to the validity under the United States Constitution of the Fair Labor Standards Act (Title 29 U.S.C. § 201, et seq.; 52 Stat. 1060, as amended), particularly as the same was amended by P. L. 89-601 (80 Stat. 830); and to enjoin and restrain Defendants, individually, collectively, or through their agents or employees, from enforcing or attempting to enforce said Act against the State of Maryland, its political subdivisions and agencies, to the extent that said State or political subdivisions, through their respective departments, boards, commissions, agencies, or employees are engaged in the performance of governmental functions. The amended Act is attached hereto as Exhibit "A".

2. This Court has jurisdiction to hear and determine this cause by virtue of Title 28 U.S.C. § 1337, conferring original jurisdiction over any civil action or proceeding arising under any Act of Congress regulating commerce; and Title 28 U.S.C. §§ 2201 and 2202, the federal Declaratory Judgment Act. A statutory three-judge Court is requested pursuant to Title 28 U.S.C. §§ 2282 and 2284.

3. The State of Maryland is a sovereign State; and, under the Tenth Amendment to the United States Constitution, is entitled to exercise all of the powers of government not delegated to the United States or prohibited by the Constitution. Among the governmental powers so committed to the State of Maryland are the powers to:

(a) Establish, operate, finance and otherwise provide for a system of public schools, at the elementary, secondly, and collegiate level, and other institutions of higher education, as well as a system of public hospitals, health facilities, and institutions for the handicapped and retarded persons.

(b) Employ, upon such terms and conditions as it may deem appropriate, personnel to carry out these and other governmental functions of the State.

4. Part of the power not delegated to the United States, and, therefore, reserved to the States and the people, was

the power to determine how the operations of the State government shall be financed. The people of Maryland expressed this determination in Article III, Sections 32 and 52 of the Constitution of Maryland, the text of which is attached hereto as Exhibit "B". These sections provide that no funds shall be expended by the State or any of its agencies except pursuant to an appropriation by the General Assembly.

The State of Maryland has established a Merit System for its employees and pursuant thereto wages, salaries, job classification, hours of work and other conditions of employment are regulated in order to achieve a measure of fairness and to provide incentives for persons in State service. All State salaries and wages so determined in accordance with the merit system procedures are incorporated in the annual budget submitted by the Governor to the General Assembly. Once so established, such wages and salaries cannot be changed except in accordance with the Constitution of Maryland and laws enacted pursuant thereto.

The wages and salaries of personnel employed in the public school system of Maryland (except at the collegiate level) are determined by the various county boards of education, and the Board of School Commissioners of Baltimore City, created by State law. A major share of the cost of such wages and salaries, however, is borne by the State pursuant to Article 77, § 220 et. seq. of the Annotated Code of Maryland; and the funds for the State's share must be appropriated by the General Assembly, in accordance with the State Constitution.

5. When the Fair Labor Standards Act was originally passed in 1938, the definition of "employer", found in Title 29 U.S.C. § 203 (d) excluded "the United States or any State or political subdivision of a State"; and this statutory exclusion remained a part of the law until 1966.

By P. L. 89-601 (80 Stat. 830), the Congress, on September 23, 1966, amended § 203 of Title 29 as follows:

(a) The definition of "employer" was amended to provide.

Section 102(b) amends Section 3(d) of the Act to read as follows:

"'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, 'except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence', or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

(b) The definition of "enterprise" was amended to provide:

"Sec. 102. (a) Section 3(r) of such Act is amended by adding at the end thereof the following: 'For purposes of this subsection, the activities performed by any person or persons—

'(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit, or . . . shall be deemed to be activities performed for a business purpose.'"

(c) The definition of "enterprise engaged in commerce or in the production of goods for commerce" was amended to provide:

Section 3(s) of such Act is amended to read as follows:

"(s) 'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise

which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which . . .

(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution or school is public or private or operated for profit or not for profit)."

6. The effect of enforcement of the aforegoing amendment, if valid, would be:

(a) To require the State of Maryland, in the absence of an appropriation by the General Assembly, and therefore in violation of its Constitution, to expend additional sums for wages and salaries of certain of its personnel, and of the personnel employed in the public school system; or

(b) To require the General Assembly to make such an appropriation, and thereby circumscribe and control its legislative discretion; and

(c) To impose a substantial burden upon the State in the exercise of its governmental functions; and

(d) To nullify existing State laws, and the rules and regulations promulgated pursuant thereto, pertaining to the terms and conditions of employment of the employees of the State and its political subdivisions, to the extent that such employees may be covered by the federal Act.

7. The foregoing effects of enforcement of the amendments would cause immediate and irreparable damage to the State, its subdivisions and agencies, in the following respects:

(a) The State would never be in a position to adequately establish a budget and forecast revenue needed for the

future operation of its complex structure if expenditures could not also be equally forecast and regulated by the State or political subdivisions unfettered by external regulation and control.

(b) The State Merit System of classification of employees in similar jobs at similar rates of pay and hours of work would be immediately destroyed with the result that a serious morale problem among personnel would undoubtedly arise.

(c) State agencies and subdivisions required to provide necessary services to the public would be faced with having to curtail such services in order to meet the federal requirements.

(d) Research contracts would have to be curtailed or eliminated where the estimated cost of such programs was based on State wage and hour provisions.

8. The application of the Fair Labor Standards Act to employees of the State of Maryland and its political subdivisions, as provided by P. L. 89-601, is in contravention of the United States Constitution in each of the following respects:

(a) It violates the Tenth Amendment to said Constitution in that the power to regulate or tax the governmental functions of the State of Maryland was not, directly or indirectly, explicitly or implicitly, delegated to the Congress of the United States; that the purported exercise of such power is therefore beyond the Constitutional authority of Congress, trespasses on the rights reserved to the States and invades the sovereignty of the State of Maryland.

(b) The exercise of governmental functions, such as the operation of a public school system, hospitals and other institutions enumerated in the Act, does not constitute "commerce" within the meaning of Article I, Section 8 of the United States Constitution; that the Congress may not, by its own legislative Act, expand the Constitutional meaning of the term "commerce" and thereby proceed to regulate that which is not commerce; and that, if such govern-

mental functions do not constitute commerce, Congress has no other Constitutional power to regulate them.

9. The Defendants, through their agents and employees, have threatened to enforce the Fair Labor Standards Act against the State of Maryland and its political subdivisions in accordance with P. L. 89-601, and to apply the penalties provided for therein unless the State and subdivisions comply with it.

10. By reason of the facts herein alleged and by reason of the fact that the Act, as amended, hereinabove referred to, shall become effective on February 1, 1967, the Plaintiff will suffer immediate and irreparable damage unless a temporary restraining enforcement thereof pending a hearing on the merits of this case, be issued forthwith.

Wherefore, Plaintiff prays this Honorable Court:

1. That a temporary restraining order without notice be issued forthwith restraining the Defendants, their agents, servants, employees and attorneys from enforcing the provisions of the Fair Labor Standards Act, as amended by P. L. 89-601, against the State of Maryland, its political subdivisions and agencies, until the ultimate disposition of this case after a hearing on the merits, pursuant to 28 U.S.C. § 2284 (3).

2. That a three-judge court be convened to hear and determine this case.

3. That the Court adjudge and declare that the application of the Fair Labor Standards Act to employees of the State of Maryland and its political subdivisions, as provided by P. L. 89-601, is in contravention of the United States Constitution in each of the following respects:

(a) It violates the Tenth Amendment to said Constitution in that the power to regulate or tax the governmental functions of the State of Maryland was not, directly or indirectly, explicitly or implicitly, delegated to the Congress of the United States; that the purported exercise of such power is therefore beyond the Constitutional authority of Congress, trespasses on the rights reserved to the

States and invades the sovereignty of the State of Maryland.

(b) The exercise of governmental functions, such as the operation of a public school system, hospitals and other institutions enumerated in the Act, does not constitute "commerce" within the meaning of Article I, Section 8 of the United States Constitution; that the Congress may not, by its own legislative Act, expand the Constitutional meaning of the term "commerce" and thereby proceed to regulate that which is not commerce; and that, if such governmental functions do not constitute commerce, Congress has no other Constitutional power to regulate them.

4. That a preliminary injunction be issued restraining and enjoining Defendants, their agents, servants, employees and attorneys from enforcing the provisions of the Fair Labor Standards Act, as amended by P. L. 89-601, against the State of Maryland, its political subdivisions and agencies until the final determination of this case, and that the trial of this case on the merits be advanced and consolidated with the hearing on this prayer for preliminary injunction.

5. That a permanent injunction be issued restraining and enjoining Defendants, their agents, servants, employees and attorneys from enforcing the provisions of the Fair Labor Standards Act, as amended by P. L. 89-601, against the State of Maryland, its political subdivisions and agencies.

6. And for such other and further relief to the Plaintiff that the equity and justice of its cause may require.

(Signatures of Counsel and Affidavit.)

MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

To the Honorable Judges of said Court:

Defendants respectfully move the Court to dismiss the above action or in the alternative to grant summary judgment for the reason that Public Law 89-601, amending the

Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, is constitutional insofar as it applies to employees of a State or a political subdivision thereof employed in a hospital, school, or similar institution.

Affidavits or stipulations of fact, in accordance with the Pre-Trial Order of February 1, 1967, will be relied upon in support of the motion herein.

(Signatures of Counsel.)

ORDER

It is hereby ordered this 27th day of February, 1967, that the Order of this Court filed herein on the 6th day of February, 1967, granting leave to the State of Texas to intervene as Intervenor herein is amended to read as follows:

> "Leave is hereby granted as prayed for in the Motion to Intervene as made by the State of Texas, one of the plaintiffs herein, and it is further ordered that said State of Texas, acting by and through its attorneys of record, is granted the full rights and privileges as a plaintiff herein."

/s/ ROSZEL C. THOMSEN,
Chief Judge.
United States District Court.

MOTION FOR SUMMARY JUDGMENT

The State of Maryland, by Francis B. Burch, Attorney General, Robert F. Sweeney, Deputy Attorney General, and Franklin Goldstein, Loring E. Hawes and Alan M. Wilner, Assistant Attorneys General, and the States of Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Iowa, Kansas, Maine, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Virginia and Wyoming, by their respective Attorneys General, move the

Court to enter summary judgment in their favor, in accordance with Rule 56 of the Federal Rules of Civil Procedure, on the ground that the pleadings filed herein show that they are entitled to judgment as a matter of law.

Affidavits or stipulations of fact, in accordance with the Pre-Trial Order of February 1, 1967, will be relied upon in support of the motion herein.

(Signatures of Counsel and Certificate of Service.)

STIPULATIONS

The State of Maryland, by its undersigned counsel, and the Defendants herein, by their undersigned counsel, do hereby stipulate and agree to the following statements of fact.

I.

Fiscal Laws of the State of Maryland

1. *Article III, Section 32* of the Constitution of Maryland provides that:

> "No money shall be drawn from the Treasury of the State, by any order or resolution, nor except in accordance with an appropriation by Law . . .".

2. *Article III, Section 35* of the Constitution of Maryland provides that:

> "No extra compensation shall be granted or allowed by the General Assembly to any public Officer, Agent, Servant or Contractor, after the service shall have been rendered, or the contract entered into; . . .".

3. *Article III, Section 52* of the Constitution of Maryland provides that no money shall be appropriated except by a Budget or Supplementary Appropriation Bill. The Budget Bill is submitted to the General Assembly by the Governor, not later than the third Wednesday in January of each year and must contain a complete plan of proposed expenditures and estimated revenues for the next fiscal

year. The budget must contain an estimate of the salaries payable by the State, and sufficient funds for the establishment and maintenance of a thorough and efficient system of public schools throughout the State. Section 52 further provides that the General Assembly may not amend the Budget Bill so as to affect the provisions made by the laws of the State for the maintenance of a system of public schools.

* * * * * *

7. *Article 15A, Section 8* of the Annotated Code of Maryland, relating to amendments to the budget, provides that no such amendment shall increase the salary or salaries of any office or position beyond the amount for each such salary which is contained in the most recent State budget, except for amendments which effectuate salary changes authorized in cases of acute emergency in order to procure or to retain in the State service essential professional, technical and administrative personnel.

8. *Article 15A, Section 14* of the Annotated Code of Maryland provides that no department, board, commission, officer or institution of the State of Maryland shall at any time expend in excess of the total amount of its appropriation, and shall not expend in excess of the amount of any item in its appropriation except upon compliance with Article 15A, Section 8.

* * * * * *

10. *Article 31, Section 4* of the Annotated Code of Maryland provides that:

> "It shall be unlawful for the trustees, managers, directors or superintendent of any of the public institutions of the State of Maryland, to create a deficiency, incur a liability, or to expend a greater sum of money than is appropriated by the General Assembly of Maryland for the use of such public institution or department."

11. In the fiscal year 1966, 38.8% of the total cash disbursements by the State of Maryland will be for public education and public health, amounting to $311,600,000.00.

II.

State Merit System, State Employees' Standard Salary Board and State Retirement System

1. * * *

The purpose of the Merit System Law is to provide candidates for appointment to position in the classified service after determining by practical tests the fitness of such candidates for the positions which they seek, without regard to their political or religious opinions or affiliations. It is also to provide adequate means for the prompt removal from positions in the classified service of persons who may be indolent, incompetent, inefficient, or otherwise unfit to remain therein, and to keep in a workable state the provisions for the promotion of employees as provided in the Law to ensure that the best class of candidates will be attracted to the classified service. The State Commissioner of Personnel is the chief personnel officer for the State of Maryland, which at present employs approximately 26,850 classified and 3,100 unclassified employees.

The State Commissioner of Personnel is also Chairman of the State Employees' Standard Salary Board which is responsible for preparing and recommending to the Governor a pay plan for the State's classified and unclassified employees.

* * * * * *

2. *Article 64A, Section 27* of the Annotated Code of Maryland requires the State Employees' Standard Salary Board to prepare and recommend to the Governor a pay plan for all classes of positions in both the classified and unclassified service, to the end that all positions in such services involving comparable duties, experience, responsibilities and authority shall be paid comparable salaries in accordance with the relative value of the services performed. In establishing rates of pay, the Board is required to give consideration to experience, the prevailing rates of pay for the services performed, and for comparable services in public and private employment, living costs,

maintenance and other benefits received by employees, and the State's financial condition and policies. The pay plan does not become effective until approved by the Governor and funds therefor are appropriated by the General Assembly. With exceptions not relevant to this case, no changes may be made to the approved pay plan unless such changes are first approved by the Governor, and the funds therefor are appropriated by the General Assembly. Whenever the Board finds an increase in the market value of services performed by any class, it is the duty of the Commissioner of Personnel to identify and present to the Board for consideration at the same time all of the related classes which are affected by the same change in market value.

3. *Article 64A, Section 30* of the Annotated Code of Maryland requires the State Employees' Standard Salary Board to formulate rules and regulations which include provisions for automatic increases from minimum to maximum of the rates established by the schedule.

* * * * * *

7. The State of Maryland and the local school systems are presently paying the federal minimum wage to all of their employees. The State has established a 35½ hour work week for its employees. It is often necessary, however, to require that some of the employees work overtime hours. In some instances, under present State law, such employees are compensated for their overtime work at their normal rate of pay (i.e., "straight" time). In most cases, the State does not pay the overtime pay, but instead compensates these employees by permitting them to take off at another time a number of hours equal to the overtime hours worked (i.e., "compensatory" time). In this manner, if an employee works 45½ hours in one week, he is paid for 35½ hours, but may be permitted to take off 10 hours in another pay period when, although he works only 25½ hours, he is paid for the full 35½ hours. Such compensatory time may be distributed among two or more pay periods.

In most cases where compensatory time is accumulated, the employees are required to work overtime hours be-

cause of seasonal work or other temporary reasons which may extend over several weeks. They do not, therefore, necessarily receive compensatory time off during the same pay period, but may receive it months later. This is particularly common with laborers and employees of the State Roads Commission but is not limited to such personnel. If the Fair Labor Standards Act, as amended by Public Law 89-601, were effective, therefore, the State, in these instances, would not be able effectively to utilize the device of compensatory time to offset overtime hours worked.

In such cases, the employees' work load cannot be spread evenly over the year. More than half of their total yearly hours may be required in a particular six-month period, and less than half of their total yearly hours are needed in the other six-month period. In these instances, the State by permitting the employees to utilize their compensatory time in the slack period, pays straight time for the full number of hours, but can adjust the weekly hours to the work schedule. If the Fair Labor Standards Act, as amended by Public Law 89-601, is effective, however, the State, by being unable to utilize the compensatory time approach, would be required to pay the premium rate (150% of normal hourly wage) for the overtime hours during the peak period, and also be required by the Standard Salary Plan under State law to pay the full straight time weekly salary even though less than a full week of work is actually performed or is actually needed.

III.

Public School System

1. *Article VIII* of the Constitution of Maryland required the General Assembly at its first session after the adoption of the Constitution to establish throughout the State a thorough and efficient system of free public schools, and to provide for the maintenance by taxation or otherwise.

2. *Article 77* of the Annotated Code of Maryland creates a local board of education in each of the twenty-three

counties of the State, and a board of school commissioners in Baltimore City. Subject to the supervision exercised by the State Board of Education and the State Superintendent of Schools, as provided in said Article 77, the management and control of the public school system is vested in the said local boards.

3. *Article 77, Section 68,* requires each county of Maryland and Baltimore City to levy a minimum tax for the maintenance and support of its school system. Section 220 of Article 77 requires the State to appropriate an additional amount in accordance with a formula set forth therein. In accordance with these laws, the State provides from general tax revenues approximately 50% of the entire school expenditures.

4. The State of Maryland also has four State training schools and administers and supervises four forestry camps for delinquent boys. The State opened in 1959 and operates the Maryland Children's Center, which is a facility for short-term detention and study of boys judged delinquent by the courts, and in 1963 opened and now operates the Thomas J. S. Waxter Children's Center, a forty-bed detention and study facility for boys and girls. The training schools and their population are as follows:

	Population
Boys Village of Maryland	200
Victor Cullen School	170
Maryland Training School for Boys	440
Montrose School for Girls	268

In all of these institutions, many more children spend some time at the institution during the course of the year than the average actual detained population figures.

The four forestry camps accommodate approximately 120 boys.

5. The total school population in Maryland as of September 30, 1965 (from nursery school through Grade 12) was 911,654. The breakdown as to public and non-public school population was as follows:

	Population	% of Total
Nursery School (private)	4,659	.52
Kindergarten	41,034	4.52
Public 32,730		
Private 8,304		
Catholic Schools (including kindergarten and nursey)	115,616	12.69
Campus Schools	939	.02
Other Religiously Affiliated Non-Public Schools (excluding kindergarten and nursery)	8,433	.94
Other Non-Public Schools not religiously affiliated)	9,432	1.05
Public School (excluding kindergarten and nursery)	730,074	80.09
State Institutions	1,467	.17
Total	911,654	100.00

The State of Maryland does not provide free public kindergartens, although Baltimore City and Montgomery County have a system of such kindergartens. The public kindergarten figure represents the children attending kindergarten in those two subdivisions plus the kindergarten population of 168 in the campus laboratory schools operated by the State Colleges. The State does not operate public nursery schools, so that the figure for nursery schools is entirely that of non-public nursery schools.

Thus, of a total of 865, 961 children enrolled in Grades 1-12, 856, 529, or 98%, are enrolled in public or religiously-affiliated non-public schools. Less than 2% are enrolled in schools operated for commercial purposes.

6. There are no private institutions in Maryland which provide the same types of facilities for children as are provided by the training schools and the forestry camps described in Paragraph 4 above.

7. The estimated expenditures for the public school system in Maryland for 1966-67 is $440,950,000.00. In addition, further expenditures of $99,000,000.00 for capital improvements and $23,000,000.00 for interest on the school debt are anticipated. For the year 1963-64 (which is agreed to be representative of later years), 93.3% of the total revenue used for public school purposes came from State and local funds. Another 6% came from federal funds.

8. The State of Maryland receives certain funds from the federal government in order to be able to loan books and other instructional laboratory materials to non-public schools. In the latest fiscal year $385,371.00 was expended in federal funds for the purchase of materials requested by these schools. The materials remain the property of the State Department of Education, and all materials are so labeled before shipment to the requesting schools.

9. The Board of Trustees of the State Colleges operates five State Colleges in Maryland. As of October 1, 1966, their enrollment was as follows:

	Total Enrollment	*Out-of-State Students*
Bowie State College	505	74
Coppin State College	590	3
Frostburg State College	1,687	34
Salisbury State College	660	59
Towson State College	3,813	60
Total	7,255	230

IV.

State Publicly Owned and Operated Hospital Facilities

1. The State Board of Health and Mental Hygiene is responsible for the health interests of the State and the provision of adequate health services and medical care in accordance with such interests. It has jurisdiction over and is the policy making authority for the State Department of Health and the State Department of Mental Hygiene. These two departments function as the technical arm for

the line units of the Board. One of the functions of the State Department of Health is to operate three chronic disease hospitals and two tuberculosis hospitals.

2. The three chronic disease hospitals are:

Montebello State Hospital
Deer's Head State Hospital
Western Maryland State Hospital

These institutions were created by Article 43, Sections 598 *et seq.* of the Annotated Code of Maryland. Section 599 of Article 43 dealing with the admission of patients to the chronic disease hospitals, provides:

> "Patients may be admitted who can pay part or all of the costs of their care only when the special facilities required by their conditions are not otherwise obtainable elsewhere in Maryland."

The total beds in the chronic disease hospitals are as follows:

	Beds
Montebello	392
Deer's Head	284
Western Maryland	298
	974
Baltimore City Hospital	713
Total	1,687

3. In addition to the public chronic disease hospitals, there are in Maryland three hospitals which specialize in the treatment of pediatric problems. They are:

	Beds
Children's Hospital	150
Happy Hills Convalescent Home	62
James Lawrence Kernan Hospital for Crippled Children	114
Total	326

The only other institutions which can be classified as chronic disease hospitals are:

	Beds
Home for the Incurables of Maryland	205
Levindale Hebrew Home and Infirmary	263
Total	468

Pursuant to the directive of Section 599 of Article 43, none of the non-public facilities which may be classed as chronic disease hospitals can provide the special facilities required by the patients at the public chronic disease hospitals.

4. The two tuberculosis hospitals operated by the State Department of Health are the Mount Wilson State Hospital with 500 beds, and Pine Bluff State Hospital with 65 beds.

The only other institutions having tubercular beds in the State are Baltimore City Hospital which has 302 beds, and Springfield State Hospital which cares for those mental patients who may have tuberculosis.

A total of 867 beds, all publicly owned and operated, constitutes the total provision for tubercular care in the State of Maryland. There are no non-public hospitals having beds especially for tubercular patients.

5. The Department of Mental Hygiene operates four hospitals for the mentally ill or emotionally disturbed, which are as follows:

	Beds
Springfield State Hospital	3,150
Spring Grove State Hospital	2,282
Crownsville State Hospital	1,953
Eastern Shore State Hospital	630
Total	8,015

The Department of Mental Hygiene also operates the Clifton T. Perkins State Hospital, which is a maximum security mental institution, designated as the institution

for the criminally insane. It has 300 beds. In addition, the Department of Mental Hygiene operates two hospitals for the mentally retarded, namely:

	Beds
Rosewood State Hospital	2,592
Henryton State Hospital	403
Total	2,995

5. There are two mental institutions in the State of Maryland affiliated with religious organizations, the Seton Institute with 300 beds and Brook Lane Psychiatric Center with 40 beds. There are six other institutions which are classed as mental hospitals, operated by non-public and non-religious organizations. They are as follows:

	Beds
Gundry Sanitarium	33
Johns Hopkins Hospital	82
Sylvan Retreat	90
Sheppard Pratt	265
Taylor Manor	101
Chestnut Lodge, Inc.	90
Total	661

The number of patients in these non-public, non-religiously affiliated institutions, assuming but not agreeing that said institutions are similar in function to those operated by the State of Maryland, represents 5.3% of the total hospitalized mental patients in the State.

V.

Selected In-State and Out-of-State Purchases by State Hospitals and Local School Systems

1. For the fiscal year ended June 30, 1966, the Maryland State Department of Health made purchases as follows for Deer's Head State Hospital, Montebello State Hospital.

Western Maryland State Hospital, Mount Wilson State Hospital, and Pine Bluff State Hospital:

	Total Expenditures	*In Maryland*	*Out of Maryland*
Drugs & Medicines	$142,159	$ 73,562	$68,597
X-Ray Supplies	16,804	16,183	621
X-Ray Equipment	263	263	—
Hospital Beds	12,732	12,732	—
Total of Items	$171,958	$102,740	$69,218

It is agreed that an undetermined portion of the items shown as purchased "In Maryland" may have been produced in other states.

2. For the fiscal year ended June 30, 1966, the Maryland State Department of Mental Hygiene made purchases as follows for Crownsville State Hospital, Eastern Shore State Hospital, Henryton State Hospital, Clifton T. Perkins State Hospital, Rosewood State Hospital Institute for Children, Spring Grove State Hospital, and Springfield State Hospital:

	Total Expenditures	*In Maryland*	*Out of Maryland*
Hospital Beds	$ 42,724		
X-Ray Supplies	27,659		
X-Ray Equipment	13,512		
Medicines, Drugs and Chemicals	211,888		
Special Drugs	468,870		
Medical and Surgical Supplies	110,808		
Total of Items	$875,461		

It has not been possible to determine what proportion of the above represent Maryland purchases and out-of-state purchases. However, the following general statements can be made:

(a) The total expenditures for special drugs represent the cost of tranquilizers and special psychiatric drugs, all of which are purchased directly from manufacturing firms located outside of Maryland.

(b) The expenditures for medicines, drugs and chemicals are, for the most part, for purchases of drugs and medicines through Maryland distributors, but the firms manufacturing these products are, for the most part, located outside the State.

(c) With reference to the purchase of hospital beds, many of these are purchased from State Use Industries, but any specialized beds, such as crib beds, etc., are purchased from manufacturers outside of Maryland.

(d) It is agreed that an undetermined portion of X-Ray supplies and equipment, and medical and surgical supplies, even though purchased in Maryland, may have been produced outside the State.

3. For the fiscal year ended June 30, 1966, the University of Maryland made purchases as follows with respect to the University Hospital:

	Total Expenditures	*In Maryland*	*Out of Maryland*
Drugs & Medicines	$398,329	$151,458	$246,871
X-Ray Equipment	3,430	—	3,430
Hospital Beds	2,937	—	2,937
Total of Items ..	$404,696	$151,458	$253,238

It is agreed that an undetermined portion of the items shown as purchased "In Maryland" may have been produced in other states.

4. For the fiscal year ended June 30, 1966, the local public school systems of Maryland made purchases as follows:

	Total Expenditures	*In Maryland*	*Out of Maryland*
Textbooks	$4,619,356.76	$ 21,913.39	$4,597,443.37
Furniture	3,290,830.81	940,644.60	2,350,186.21
Lockers	240,739.50	21,706.05	219,033.45
Total of Items	$8,150,927.07	$984,264.04	$7,166,663.03

5. The materials, supplies and equipment purchased by the State hospitals, the University Hospital and the local school systems are purchased for use and consumption by said agencies in the performance of their functions. Certain items, such as books used in the schools, are made available to students on a temporary basis and without charge, unless lost or destroyed. Other items, such as lockers, chairs and desks, remain in the possession of, and on the premises of, the school but are assigned to the students temporarily. Still others, such as visual aids, are neither delivered nor assigned to individual students but are operated by school employees for the benefit of students as a group. Materials, supplies and equipment purchased and used by the hospitals in relation to their patients are similarly handled except with respect to drugs, medicines and foods administered to the patients, generally without charge, and not returned. At the University Hospital charges are made to paying patients.

VI.

Selected Expenditures of Other State Offices

1. For the fiscal year ended June 30, 1966, the Office of the Governor of the State of Maryland had out-of-state expenditures for equipment, supplies, and gas and oil totaling $8,744.27.

2. For the current fiscal year commencing July 1, 1966, the Court of Appeals of Maryland and the Court of Special Appeals of Maryland has expended $31,496.00 for equipment, law books, and contractual services from sources outside of the State of Maryland.

3. For the current fiscal year commencing July 1, 1966, the Secretary of State of Maryland has had total expenditures for printing of $8,960.00, of which $7,750.90 were expenditures outside the State of Maryland.

4. There are twenty-three (23) counties in the State of Maryland and each county has a circuit court. The functions of the circuit court of the county are carried on in Baltimore City by the Supreme Bench of Baltimore. For the fiscal year ended June 30, 1966, the Clerk of the Circuit Court for Baltimore County purchased $1,878.69 of office supplies; $83,862.50 of dockets, stationery and printing; and $6,060.70 of equipment. Such purchases were made from Maryland distributors, but an undetermined portion of said items, came from out-of-state producers. The dockets, which make up the largest item of expenditure, were furnished by the Paul Company, which is a local representative of the Cott Index System. The Cott Index System has its main office in Columbus, Ohio. In Montgomery County, the Circuit Court purchased its docket supplies from the Russell Index System in Reading, Pennsylvania.

5. For the fiscal year ended June 30, 1966, the Maryland State Police expended $135,766.00 for the purchase of apparel. Of this amount, $14,710.00 was purchased from suppliers outside of Maryland, and of the balance, purchased from suppliers in Maryland, some portion of the apparel was manufactured outside of Maryland. For the calendar year ended December 31, 1965, the Baltimore City Police Department, an agency of the State of Maryland, expended $411,154.00 for motor vehicles and $2,644.00 for weapons, some portion of which were manufactured outside of Maryland.

6. For the fiscal year ended June 30, 1966, the Office of the Attorney General of Maryland expended $13,033.65 for automobiles, books, equipment, and stationery. Of this amount, $3,289.98 was expended for purchases made outside of Maryland, and, of the balance, some portion of such items were manufactured outside of Maryland.

VII.

Financial Burden On the State of Maryland If P.L. 89-601 Is Valid

1. For the period of February 1, 1967-June 30, 1967, the local public school systems of Maryland would be required to expend $923,988 in overtime pay which would not have to be paid if P.L. 89-601 were not in effect. For the period of September 1, 1967, to January 31, 1968, an additional sum of $923,988 is expected to be expended for overtime pay which would not have to be paid if P.L. 89-601 were not in effect, making a total for the ten months of school operation of $1,847,976.

2. For the fiscal year ending June 30, 1967, the State of Maryland would be required to expend $438,800 in overtime pay to directly affected employees which would not have to be paid if P.L. 89-601 were not in effect. The agencies involved in this additional expense (by whom the affected personnel are employed) are The Department of Mental Hygiene, the Department of Health, Patuxent Institution, Bowie State College, Coppin State College, Towson State College, Frostburg State College, Salisbury State College, Morgan State College, St. Mary's College, School for the Deaf, the Maryland Training School, Montrose Training School, Victor Cullen School, Thomas J. S. Waxter Children's Center, Maryland Children's Center, Esther Loring Richards Children's Center, Jacob E. Finesinger Children's Center.

3. The State is required under its merit system law, referred to above in Stipulation II to pay comparable salaries for all positions involving comparable duties, experience, responsibility, and authority. It would therefore be necessary to pay other employees not directly covered by the Fair Labor Standards Act but performing similar duties the same rate of overtime pay for all hours worked in excess of the federally-established maximum. In order to comply with both P.L. 89-601 and the applicable State laws, the State would be required to expend $1,884,800 in overtime pay to its employees for the fiscal

year ending June 30, 1967, which would not have to be paid if P.L. 89-601 were not in effect.

4. Based upon a 44-hour week, the University of Maryland would be required to expend annually $170,000.00 to cover additional overtime pay to directly affected employee, and additional costs for record keeping, computation and auditing, which sum would not have to be paid if P.L. 89-601 were not in effect.

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IX.

Extended Effect of Public Law 89-601 on University of Maryland

1. The University of Maryland is the State university and land grant institution of Maryland. It is also a department of the State government, under the executive branch. Maryland Code (1957) Art. 41, Secs. 2 and 201. The Board of Regents, whose members are appointed by the Governor, is the governing body of the University, having powers provided by law. There are approximately 12,000 employees and 42,000 students at the University at the present time. The employees are paid out of the treasury of the State of Maryland.

2. The University of Maryland presently operates 4 major campuses in the State of Maryland located at College Park, Baltimore, Catonsville, and Princess Anne. The major administrative divisions of the University are as follows:

College of Agriculture
College of Arts and Sciences
College of Business and Public Administration
College of Education
College of Engineering, the Glenn L. Martin Institute of Technology
Agricultural and Home Economics Extension Service
Agricultural Services and Controls
School of Dentistry
School of Law
School of Medicine
College of Home Economics

Department of Air Science
College of Physical Education, Recreation and Health
University College
Graduate School
Summer School
Agricultural Experiment Station
Computer Science Center
Natural Resources Institute
School of Nursing
School of Pharmacy
School of Social Work
University Hospital

3. The basic functions of the University are teaching, research and services. Its role in the government of the State of Maryland is to provide at a minimum cost maximum opportunities for higher education, including undergraduate, postgraduate, professional and adult education. It provides for research in agriculture, the sciences, engineering, education, medicine, air and water pollution, and in other fields. The University further provides a number of extension services to the community in Maryland related generally to its educational and research missions, and its University College Division offers educational programs to U. S. military and civilian personnel and their dependents under contract with the U. S. Government in military installations overseas. The overseas program is entirely self-supported from funds received from student tuition and logistical support from the U. S. Government. No State funds are involved. The European division maintains a central office in Heidelberg, Germany, serving installations in several European countries. The Far East division is located in Fuchu, Japan, and serves military installations in several Asian countries.

4. The University, in connection with its medical school, operates University Hospital, all of the employees of which are employees of the University. The University Hospital has an average daily census of 514 in-patients. There were 721 average daily visits to the out-patient department and emergency room in fiscal year 1966.

5. The work-week for administrative and clerical personnel is 36¼ hours, with compensatory time only allowed up to forty (40) hours. Beyond 40 hours the employee is

paid overtime at the basic hourly rate only where funds are available, or is given additional compensatory time. Compensatory time must be taken within 30 days of the time it is accumulated, unless permission is granted to take such time at a later date. Many employees are able to take accumulated compensatory time at Christmas and other holiday seasons. Physical plant personnel, laboratory and research technicians, and hospital employees are on a 40 hour week, with the same provisions for compensatory time or straight time overtime payments described above.

6. The physical plant services affected by the Act are primarily services such as snow removal, traffic control, unusual maintenance problems, and policing special events such as lectures, meetings, music, theatre, class programs and athletic events. Such events generally occur on weekends or in the evening.

7. In the event additional funds should not be made available from State, Federal or other sources to pay the additional cost as hereinabove set forth, P.L. 89-601 may have the following impact upon the University:

(a) Some research projects may have to be abandoned because the additional cost involved in payment of overtime cannot be made up from the contract funds by reductions in personnel or other expenditures.

(b) Some research projects, if required to be put on a limited work week basis (e.g., 40-hour week), would take longer to complete or achieve significant results. However, most research contracts are funded on an annual basis and results are expected to be achieved within the year.

(c) Award of advanced degrees to graduate research assistants working on research projects which have been delayed or abandoned would also be delayed or made impossible.

(d) Some activities requiring physical plant personnel, such as those hereinabove described, community services and hospital services may have to be curtailed.

* * * * * *

STIPULATION

It is agreed and stipulated by and between the State of Ohio as an Intervening Party Plaintiff, and W. Willard Wirtz, Secretary of Labor, et al. as Defendants that the hereinafter set forth statements of facts and exhibits attached hereto may be accepted by the United States District Court for the District of Maryland as true and correct, and may be received as evidence in the above styled case subject, however, to the right of either party to object on grounds of relevancy and materiality. * * *

* * * * * *

(D) Estimated Additional Costs to Comply with Fair Labor Standards Act.

For the fiscal year ending June 30, 1967, Ohio State University which is the largest of all state supported universities in the State of Ohio would be required to expend, under the provisions of the Fair Labor Standards Act as amended by P. L. 89-106, effective February 1, 1967, at least an additional $360,000 for overtime pay to covered employees based on a sampling of six pay periods in fiscal 1966 covering 1,068 individuals.

Further, for the fiscal year ending June 30, 1967, Ohio State University Hospital would be required to expend under the provisions of the Fair Labor Standards Act as amended by P. L. 89-106, effective February 1, 1967, at least an additional $72,000 for overtime pay to covered employees based on a sampling of six pay periods in fiscal 1966. (See Exhibit 6, which is attached hereto.)

* * * * * *

* * * The materials, supplies, and equipment purchased by the State hospitals, the University Hospital, and the local school systems are purchased for use and consumption by said agencies in the performance of their functions. Certain items such as books used in the schools are made available to students on a temporary basis and without charge, unless lost or destroyed. Other items such as locker, chairs and desks remain in the possession of, and

on the premises of, the school but are assigned to the students temporarily. Still others such as visual aids are neither delivered nor assigned to individual students but are operated by school employees for the benefit of students as a group. Materials, supplies and equipment purchased and used by the hospitals in relation to their patients are similarly handled except with respect to drugs, medicines and foods administered to the patients, generally without charge, and not returned. * * *

* * * * * *

STIPULATION BETWEEN STATE OF TEXAS AND DEFENDANTS

It is agreed and stipulated by and between the State of Texas, one of the Plaintiffs herein, and W. Willard Wirtz, et al., as Defendants, that, reserving to each party objections on grounds of relevancy and materiality, the hereinafter listed basic facts would be testified to by the various persons named below, having knowledge thereof, if they were present and placed under oath before this Court and that all or any part of the Stipulation may be introduced without objection in the trial of the captioned case. It is further agreed and stipulated that the Defendants herein do not accept or agree to or consent that they or the Court shall be bound by the inferences, opinions and conclusions herein expressed or by any statements of ultimate fact (e.g. that compliance with the overtime provisions of the Act will increase costs by any specific amount per year) which are not supported by basic facts (e.g. numbers of employees, working schedules, rates of pay and a description of the method of computation). It is further stipulated that the inclusion of information concerning the operation of any of the agencies of political subdivisions of the State of Texas hereinafter mentioned is not admission that such agency or political subdivision is, in fact, subject to regulation under the provisions of the Fair Labor Standards Act, as amended by Public Law 89-601:

I.

The Board of Control. William J. Burke, Executive Director of the Board of Control and Sam G. Cook, Chief of

the Purchasing Division of the Board of Control, if placed under oath would testify as follows concerning the operation of said agency.

A. Organization. The Board of Control was established under the provisions of Article 664-3, Vernon's Annotated Civil Statutes of Texas, commonly known as the State Purchasing Act of 1957, a copy of which is attached hereto as Exhibit 1.

B. Duties. The Board of Control is required by law to handle those purchases for which the Legislature makes appropriations to the respective Agencies. The purchases are made on the basis of requisitions submitted to the Board of Control by the various State Agencies at the time the need for any given commodity arises.

C. Particular Types of Purchases. 1. Purchases for the Texas Education Agency: The Board of Control does not purchase textbooks for the Texas Education Agency for use in the Public Schools of Texas. The Textbook Commission is given this particular right by statute. The Board of Control does, however, purchase school buses.

2. The School Districts of the State receive assistance from the State for the transport of children to and from their homes. They are allowed so much per pupil per year for the transport service. The statute provides that the Board of Control will buy for the School District receiving such school aid, school buses, tires and tools. The law requires that our Agency make purchases on the basis of competitive bids and if all things are equal, then the award be given to a Texas concern. This does not mean a Texas manufacturer — this means a company submitting a bid must be a Texas company. This practice is followed in connection with school buses as well as other items. To our knowledge, we have not had a bid for a school bus or buses offered from a distributor or company from outside of the State. Our Agency in placing bids gives the specifications for the type body, the interior equipment, the size motor and other details necessary for the distributor or agency desiring the bid to have the full information as to the type bus that we require. The chassis for these buses

are usually manufactured outside of the State. Some automobile companies have assembling plants within the State, although the parts are manufactured elsewhere. There is only one company in the State that manufactures bus bodies, and we do not believe that they are manufacturing school bus bodies at this time. We would assume that these bodies are now all being made outside of the State of Texas. However, our contract is with the dealer who is located in the State and is for a complete school bus without regard as to the origin of the body or the chassis. We do not make any direct contract with the manufacturer or either the body or the chassis. When we find that an out of state company is going to supply the body on a particular contract that has been let by us, we would probably send an inspection team to check the bodies in the process of manufacturing to see that they are complying with our specifications. This occurs after the sale has already been made by the local representative or dealer. The School District does not make any type of contract with the plant itself. The School District pays the Board of Control for the exact cost of the bus and the Board of Control, in turn, pays the person who receives the contract. We do not add anything to the purchase price to cover our cost of handling or our overhead, as this is all paid by the State of Texas. In some instances, we purchase batteries for a School District if the School District wants to get them in accordance with agreement that we may have with the company selling batteries to us for the State. This is merely an accommodation service and it is not required by statute. All of the batteries purchased in Texas for the past several years have been purchased from a San Antonio firm, the Reliable Battery Company, who manufactures their own batteries. In regard to automobile tires, tires are furnished to the State through the tire manufacturers who have distributors established in Texas. A part of the bid invitation requires a statement on the part of the tire manufacturer from the point in Texas from which the tire will be shipped. The contracts are usually made with the local distributor such as Littleton Tire Company in San Antonio or Jodie Jackson in Austin or Kelly Springfield, who manufactures tires in Tyler. Goodyear or other tires are all shipped into Texas

or manufactured in some plant in Texas for these people. We are dealing with people in Texas who represent or serve as distributors for those firms. Again these are private individuals who own their own businesses and are serving as distributors. The State purchases about $1,200,000 worth of tires a year and approximately $200,000 of this amount is purchased for School Districts. Of the total amount of tires purchased, about $750,000 are Armstrong tires, about $350,000 are Kelly Springfield tires. The Armstrong plant is located in Mississippi. Again, we might say that we do not deal directly with the manufacturer. The biggest user of these tires is the Highway Department, then the Parks and Wildlife Division and the Department of Public Safety would be the next largest users. We do not purchase any other supplies for School Districts.

3. Food Purchases: Our Agency purchases food for all of our State Hospitals and all other Texas institutions that have people in either care or custody, except what portion of food that the Prison System might produce for its own use. All of our purchases are made from local wholesale grocery houses. Of course, a lot of these products come from outside of the State and a large amount particularly of canned vegetables originate from packing plants inside of the State of Texas. When we place an order, we do not require that the wholesale grocer list the point of origin of the product supplied. We specify the products that we want, the size cans, and such similar data, and the wholesaler supplies those that he has on hand or those he can obtain in order to meet the bid. We keep no record of what percentage are actually canned in Texas, as this would be an insurmountable problem. Likewise, we contract for all of the meats used. The meats come from Texas producers. The packing houses such as Swift, Wilson and others have Texas operations. We do not know of any meat delivered to Texas institutions that would not have been produced in the State of Texas. In other words, we do not feed the real expensive type meat that might be shipped in from out of state. We also contract for staples on a quarterly basis from wholesale grocers, and while we believe a good percentage of these items are produced in

Texas, we cannot dictate the origin of the material. Purchases of detergents, brooms, mops, and other cleaning materials are now made from the Department of Corrections since the passage of Article 6203c, Vernon's Annotated Civil Statutes, which allows the Prison System of Texas to produce certain items for use by State Agencies. We control the specifications and price, and the Agencies under a catalogue arrangement order these supplies directly from the Prison System. The Agencies themselves purchase fresh vegetables and other perishables in their localities.

4. Drugs and Hospital Supplies. Perishable drugs are usually ordered by us directly from major pharmaceutical houses. Our Agency has a Drug Committee that assists in this and consists entirely of pharmacists. The various State Hospitals advise the type of drugs needed and we make contracts direct with out of state pharmaceutical houses based on a Federal or State price list purported by the manufacturer to be the lowest price available. Other drugs such as aspirin and other commodities that can be bought under their generic terms are usually handled by the San Antonio Drug Company and other Texas firms, but vitamins and specialty items come directly from the manufacturer. The major portion of our drugs, therefore, are bought from out of state houses and are shipped directly to the hospitals. On the other hand, all hospital supplies and equipment are purchased through Texas distributors. Most of these items are, however, probably manufactured outside the State of Texas. However, contact again is not made with the manufacturer, but with the local distributor. As both we and the manufacturers feel that this type of specialized equipment would need a certain amount of service, the office servicing the equipment needs to be close to its destination. Again, we are not interested in determining the origin of the manufacturer, but merely that the equipment meet certain specifications. We might say this office buys everything that is bought out of General Revenue of the State except emergency purchases that we authorize an institution to make. The Board of Control is even expected to purchase those items that are furnished under Federal grants to the State.

5. Purchases for Institutions of Higher Learning. Our purchasing procedure is the same for Institutions of Higher Learning as for other institutions. We do grant these institutions on occasions authority to purchase particular items from individuals on a negotiated basis, such as a library collection on a particular subject. We do not purchase food for dormitory use or other items maintained by the Universities for the benefit of the students. These are purchased by the Universities out of a revolving fund maintained by them.

II.

The Texas Youth Council. Dr. James A. Turman, Director of the Texas Youth Council, if placed under oath would testify as follows concerning this agency:

A. Organization: The Texas Youth Council was created under the provisions of Article 5143d, Vernon's Annotated Civil Statutes, copy of this act being attached hereto as Exhibit 2. The Youth Council consists of three members appointed by the Governor with the consent of the Senate, and the Council appoints the Executive Director. The Youth Council maintains supervision of all the State Training Schools and Parole Supervision of State wards, and it also controls and supervises the State Homes for Dependent, Neglected Children.

B. Organizational Structure of State Training Schools: The State Training Schools are institutions maintained by the State of Texas as correctional facilities for delinquent children. All children under supervision at the Training Schools have been committed to the care and custody of the Youth Council by a court order finding the child to be guilty of acts of delinquency. These institutions are commonly known and called in many areas "Reform Schools". Training Schools for girls are located at Gainesville, Texas, and at Crockett, Texas. The Training School for boys is located at Gatesville, Texas. This Training School complex consists of seven different schools. Each of these units has its own semi-autonomous structure and has a Unit Superintendent. A General Superintendent is in charge of the

seven schools. The Mountainview School for Boys is also located near Gatesville and is a security-type institution.

C. School Provisions: The institutions maintained for Dependent, Neglected Children contract with the local School District in that area for the children in that particular institution to attend the local schools. The schools are not operated or maintained by the institution. In the case of the Training Schools, however, each Training School consists of an Independent School District, co-extensive with the State property owned in connection with the Training School. The Board of the Youth Council serves as the School Board for each of these School Districts. Of course, no taxes are levied and all funds expended are provided by the State of Texas through appropriations by the State Legislature. These schools are fully accredited through high school level by the Texas Education Agency and receive the same grants and aids through the Texas Education Agency as do other Public Schools in Texas. The students at these schools are composed entirely of those children committed to our custody and care for delinquent acts. Children of our employees who live on the premises are sent to Public Schools in their respective counties and are not allowed to attend classes with the children which are the responsibility of the Youth Council. Most of these children when assigned to the Youth Council are two or more years behind their age group if enrolled in a normal School District. It is the policy of the Youth Council to require the child to attend academic school for eleven months of the year. In addition, courses in vocational training are given for those old enough to participate in and profit by it. This is in addition to the academic school work. Twice a year the institutions have formal commencement, graduation exercises.

D. Operational Procedure: In addition to academic and vocational training, as a part of the rehabilitation program every child has required work to do. These tasks include makng his bed and taking care of the cleaning of the dormitory, and the maintaining and keeping of the grounds. In addition to this, each institution has a recreation program usually in the latter part of the day. There is some form

of recreational program every day. All in all, the child's time is occupied approximately all of his waking hours. We feel that this program is necessary for the rehabilitation of the child. We must bear in mind that each of these children was a 100% failure when committed to the care and custody of the Youth Council. The family, the school, the community, the church and the court had failed to help any of them to any extent at the time they were committed. There was obviously nothing in their community that could meet the needs of these children, and the Court had no alternative but to send them to the Youth Council. After a period in the Supervised Parole, approximately 24% of these children come back a second time and only 3.9% of the people now entering the penitentiary have ever been in the State Training School. When the child is placed on parole, he is returned to his own community under supervision. More than 50% of these children return to the Public Schools and continue their education. The parole officer is located in the area where the child is living. While in their respective institutions, however, the children are under close supervision and are kept under control and surveillance 24 hours a day. They are not free to come and go as they please. Most children are assigned to a dormitory-type facility having thirty boys to a dormitory. They make their own beds, sweep the floor, keep the building where they live and after school they take care of the grounds around the area. Some of them work on KP duty. KP duty is rotated and is considered a vocational training program. Many of these children have never been able to get or hold a job. Trained instructors advise those in the KP program on proper methods of work in this area so that they may get a job later in some public establishment. In Mountainview School particularly, some of these boys are trained as chefs and have gotten jobs as cooks in hotels and restaurants after being released. In addition to rehabilitating the child, the work performed by the child keeps the institution functioning. The program is very much like that found in the Army. Without their services in cleaning the barracks and grounds, it would be very difficult to maintain each institution. The Mountainview School is different from the other institutions only in that it is a security-type

institution. It has a fence around it. The program inside it is the same. The children assigned to Mountainview, however, are chronic, serious offenders. Every one of these children have committed what would have been, almost without exception, a capital offense had they been old enough to be charged as an adult. These are such offenses as murder, armed robbery, rape and other serious offenses to our society. Under this program, these children have adopted to the return to society even better than those in the open-type institution — possibly because the average length of stay is twenty-seven months in this institution as against an average length of stay of approximately ten months in others. They are given more training and have a longer period of controlled treatment through the use of counselors, psychiatrists, psychologists, as well as teachers. Most of them are old enough to understand that if they get into serious trouble again, they can possibly be prosecuted as an adult. In regard to the work program, it is the feeling of the Youth Council that these children must have tasks assigned to them because there is dignity in work. Many of these children have never known this, nor have they had the opportunity to learn this fact. Many of them have come from welfare families where they have lived entirely on the welfare check and where none of the adults in the home have worked or wanted to work because they found it easier to take the welfare path of least resistance. The Youth Council finds that for the first time many of these children learn that there is dignity in work and even pleasure and accomplishment in work; and that they can do something themselves with their own hands. We therefore feel that a work program is absolutely indispensable in any type of rehabilitation program for delinquent children — just as essential as religious training, moral training, or any other training that we might give them. Without this program, we do not feel that they could go back into the community and adjust satisfactorily. Many of the work jobs are also vocational training. There is one firm in Waco that will take every child who completes the janitorial program; the firm keeps public buildings on a contract basis.

E. Building Program. Two years ago the Legislature authorized a 244 unit at the Gatesville School. This was the last building project. Another project will be started approximately two years from this date. Buildings are built entirely on a contract basis with general contractors and none of our people assist. The 244 unit project mentioned above costs approximately $500,000 and consists of one school building and three dormitories. We had nothing to do with the purchase of the material— this is all done by the general contractor.

F. Purchases. The Board of Control buys all supplies for our institutions except perishables; these are bought locally. The other items are bought on a contract basis by the Board of Control. Some few items are bought by us locally on an emergency basis. The Board of Control also buys all desks, all office supplies and all stationary that might be needed. Textbooks are furnished by the Texas Education Agency just as they are furnished Public Schools.

G. Many of our people such as those supervising dormitories and performing similar tasks work a large amount of overtime. All of our employees are paid over $1.00 an hour. In fact, the lowest paid employee receives in excess of $1.75 an hour. Our average hourly rate is $1.88 per hour for all employees. This is based on the fact that the majority of our employees are in Group 6, Step one, and receive an annual salary of $3912.00. A few make less and a few make more. Our people are now putting in an average of 13,351 hours of overtime per week based on our 40 hour week, in compliance with the State laws. These figures are based on 717 employees being possibly subject to the Act out of a total number of 1300 employees. We give compensatory time off when we can find time and not affect the efficiency of the program. We do not feel that we could get by on less personnel than we have now because of security and training problems. To pay these people for overtime would cost $1,957,889.34 per annum (694,287 total hours). To eliminate overtime, 359 additional full-time employees would be needed at a cost of $1,404,408.00. While this would be cheaper, it would be almost impossible to find this additional personnel. Should

we likewise have to pay the children for the tasks they perform in connection with their training, we would have a cost of over $1,100,000 additionally. This figure is based on payment of $1.00 per hour with each inmate working approximately 4.25 hours a day, six days a week, less $24.00 per week for room and food. (It is agreed and stipulated, however, as to the work activities of the inmates as hereinbefore described, the Government does not contend that an employer-employee relationship exists or that the Fair Labor Standards Act applies to the children who participate in the work program.)

H. There are no existing private institutions that could maintain these children should the State operated institutions be forced to close.

I. We, the Texas Youth Council, as thus organized and functioning, use and consume all supplies purchased and does not resell any of these.

III.

Department of Health. Dr. Robert B. Skinner, M.D., Director of the Texas State Tubercular Hospitals, Frank E. Hagl, Director of Personnel, and Martin T. Love, Administrative Assistant, General Services Section, if present and under oath would testify as follows:

A. Organization. Under the authority of Article 4477-12, State Tubercular Hospitals were placed under the authority of the State Board of Health in 1965 and operated in accordance with that statute and Article 4477-11, Vernon's Texas Civil Statutes, also known as the Texas Tuberculosis Code. Hospitals are located at Tyler, Harlingen, San Antonio, and at Carlsbad, Texas, which is near San Angelo. There are no private tubercular hospitals in the State of Texas other than those mentioned in Paragraph G, p. 15 but private hospitals have isolation wards, where tuberculars may be held pending transfer to the State Hospital System. (Exhibits No. 3 and 4).

B. Under the authority of Article 4477-11, V.T.C.S., persons affected with tuberculosis can be committed to

State Hospitals and placed under quarantine to prevent the spread of this disease to other persons. The provision is made for a court order requiring such a commitment. Patients admitted to State Hospitals are those who are completely indigent and unable to pay any portion of the costs of the hospitalization and those who are able to pay all or a part of the hospital charges. By law, the hospitals are required to charge only exact costs of the services rendered, including the medicines furnished. If a person is not able to pay the entire cost of hospitalization, he pays such portion as he may be able, or the State may attempt to recover some portion of the charge from his estate or from anyone legally responsible for his care. Each of the four hospitals has slightly different charges per day. These charges run from $12.00 to $15.00 per day, depending on the hospital. This figure includes all medicines furnished, food, nursing care, physicians' services, X-rays, and other expenses. Only nine persons paid their full cost of hospitalization of approximately 2900 admissions last year. The great majority paid none of their costs; in fact, practically all of the patients were in this category.

C. Supplies for the hospitals are purchased by the State Board of Control. These purchases are made on bids after we inform the Board of Control what drugs we need. In the event a new drug appears on the market that personnel in the hospital wish to test in the treatment of tuberculosis, specifications are written, sent to the Board of Control, and it would be up to this organization to determine from the bids which particular pharmaceutical house had submitted the low bid. Drugs are charged at actual cost — that is to those patients from whom any money may be collected. No sum is added on by the hospital for administration or overhead, nor are patients charged more for the drugs administered to them because of the inability of other patients to pay for those used. It is the actual costs of these drugs as determined by the bid from the pharmaceutical house that determine our daily charge to the patients. In addition to drugs, the Board of Control buys all medical supplies, furniture, equipment, and even the food served, except perishable items which are bought locally. Meat,

however, is purchased by the Board of Control. All perishables come from Texas. It is unknown where the Board of Control purchases the other items.

D. A commissary or canteen is maintained in each hospital where patients may purchase various incidentals. There canteens are, however, not managed by the Hospital Board, but are managed by the Commission for the Blind and are operated by some blind person who operates the commissary as his own business and receives the profit therefrom. The hospital merely furnishes quarters free of charge as a service to its patients and in cooperation with the Commission for the Blind. The employees working in this canteen are the employees of the blind person operating it.

E. The hospital has some rehabilitation projects of a therapeutic nature where certain objects are made by the patients for sale. When any of the objects made by the patients are sold, the patient gets one-half of the sale price and the remainder is put back into the Revolving Fund to purchase new materials to be used by other patients in making other objects for sale. All patients in occupational therapy engage in this type program. This type of program is used as a therapeutic agent in the treatment of tuberculosis patients — for them to be engaged in this type of activity rather to remain in bed where they have nothing to occupy their time contributes greatly to their general welfare. The patients make hooked rugs, ash trays, various leather goods, ceramic articles and articles of this type. In the instances of patients who are not too well educated, this also constitutes vocational training and helps some of them to obtain employment when they leave the hospital.*

F. There are no employees in the hospitals making less than $1.00 an hour. Approximately 35 to 40 persons employed by the hospital, out of a total employee force of

* (It is agreed and stipulated, however, as to the work activities of the patients as hereinbefore described, the Government does not contend that an employer-employee relationship exists or that the Fair Labor Standards Act applies to the patients who participate in the work program.)

1319, at present make $1.00 an hour. A nurse on the average works 40 hours a week. Only in cases of an emergency would they be required to work overtime. This might result due to emergency or late-scheduled surgery.

G. In the event additional appropriation was not granted by the Legislature for overtime services when required, I, as Director of the Texas State Tubercular Hospitals, would empty some of the beds of the hospital in order not to be in violation of Federal regulations. Private hospitals do not keep tubercular patients; consequently, under existing conditions, patients discharged in order to comply with Wage and Hour Standards would be completely without hospital facilities. There is one exception to the above statement. A private hospital of less than 100-bed capacity exists in Dallas, but it is quite expensive and would not be available for our patients. Our State hospitals have a bed capacity of approximately 2922 beds.

H. Texas Tubercular Hospitals as thus organized and functioning use and consume all supplies and equipment purchased and do not resell any of these items.

I. Attached hereto as Exhibit 5 is the Annual Report of the Tuberculosis Control Division of the Texas State Department of Health.

IV.

If Jess M. Irwin, Jr., Executive Director of the *Texas Department of Mental Health and Mental Retardation* and Thomas E. Wood, Staff Legal Assistant, were present and under oath, they would state as follows:

A. Organization. This Department has the responsibility of control and management of the State Mental Hospitals and Special (for retarded persons) Schools.

B. As of December 31, 1966, there were 15,307 patients in the Mental Hospitals and 8,692 mentally retarded persons in the Special Schools. These institutions have more than 10,485 employees. This figure does not include the administrative and clerical personnel in the departmental headquarters.

C. All employees are now paid more than the minimum wage of $1.00 an hour, and the effect of the maximum hours of work will not work a great hardship or cause any serious problem in adjusting schedules to meet requirements. Should the work load increase or the number of employees be reduced, there would be hardship.

D. The Fair Labor Standards Act applies, by its plain wording, to the working patients and students in the hospitals and schools. There are two main categories involved: One, those whose work is incidental to training or evaluation and in a vocational rehabilitation capacity; and two, those whose work cannot be so defined. Under the statute, the first class must be paid any wage relative to productivity and there must be an exchange of certificates, having one for each patient between the institution head and the Secretary of Labor. Considering that the productivity average would be $1.00 an hour, it would cost the Department $2,077,470. per year to pay for such labor. (It is agreed by Defendants, however, that patients of the first class are not subject to wage and hour regulations under the current law.) The other class of patient-student labor (those not in the rehabilitation program) must be paid at least 50% of the minimum wage. (It is understood that the board, lodging and other facilities furnished to such patient-student labor may be credited against the wage so earned). Because of the difficulty of working with these people, it would be much more efficient to hire qualified help. It would require 255 employees to replace this student labor. At a wage of $1.20 per hour for a 40 hour week and for 50 weeks work from each employee, it would cost the State $5,402,400.00 to replace this student labor (Note: the State would pay for 52 weeks rather than 50 as stated as the employees get a 2 week vacation with pay, thus increasing costs.) The work contemplated would be used in the operation of cafeterias, laundries, mail rooms, offices and wards, doing housekeeping work and other similar labor.

If the Fair Labor Standards Act is applicable to these institutions, the vocational rehabilitation program will have

to be cancelled — a backward step in the treatment of mental illness and mental retardation. In regard to the second class, the Institution has neither the express legal authority under State law nor the funds to pay patients or students. In our opinion if the law is applicable, the programs of the hospitals and Special Schools will be sharply curtailed. Most patients do better when they are occupied. Consequently, if this practice were discontinued, the patients would suffer by reason of being deprived of this accepted and proven therapy.

E. The state law requires that this Department attempt to recover actual cost of care from each patient. The majority of our patients are unable to pay any portion of their hospital care. Some money is collected from a few persons in the Mental Institutions and some of the children in the Special Schools. Should the institution be required to pay on an hourly basis for the services performed by these patients in the second class, as described in Paragraph D, the State will be paying mental patients committed to State custody. This is not a far-fetched contention, as we run into numerous such instances in attempting to collect a portion of the costs of the care of the persons in our mental hospitals and Special Schools. Claims are made by attorneys representing their guardians or close relatives that this organization should pay the patient for the work performed by him in helping to keep his ward or working in the cafeteria, laundry, or other such facilities of the institution.

F. It is extremely difficult to obtain money needed in the field of mental health and mental retardation. Should the operational expense of these institutions suddenly increase several million dollars a year, it is our opinion that it is very doubtful that the Legislature would allocate additional funds. Although the law provides that persons becoming mentally ill or discovered to be mentally ill or insane in our correctional institutions be transferred to our State Hospitals, we have not had the bed space to take many of those that the Department of Corrections desires to turn over to us. Should the Fair Labor Standards Act be applied to our institutions, I as director, would be compelled to

discharge a number of the children in Special Schools and patients in Mental Hospitals (Insane asylums) in order not to be in violation of Federal regulations.

G. Because of the indigency of almost all of our patients, and their inability to afford private, mental care or for the families of those children in Special Schools to afford private institutions of this nature, very few if any of these persons could be admitted to another institution.

Since almost the entire cost of operating and maintaining Mental Hospitals and Special Schools comes from tax money allocated by Legislative appropriations to this Agency, and since those persons in our institutions would be unable to enter another institution, in our opinion we are in no way in competition with private industry.

H. All supplies used by our institution are purchased by the Board of Control.

I. The following mental hospitals and geriatric homes are under the administration of this department: Austin State Hospital, San Antonio State Hospital, Terrell State Hospital, Wichita Falls State Hospital, and Vernon Texas Branch, Rusk State Hospital, Big Springs State Hospital, Confederate Home for Men, Kerrville State Hospital and Legion Texas Annex. The following schools for mentally retarded children are under the direction of this department: Austin State Schools and Branch, Abilene State School, Denton State School, Mexia State School, Travis State School, Lufkin State School, and Richmond State school.

Each of the above hospitals and schools has its own superintendent and staff. Non-residents are not accepted at schools for mentally retarded children. Mental Hospitals accept persons adjudged to be insane and who may be dangerous without regard to residency, but an attempt is made to transfer an inmate of a Mental Hospital to the home state as soon as possible.

J. Attached Exhibit No. 6 reflects the monthly cost per hospital and Special School to comply with the Fair Labor Standards Act.

K. The parents or guardians of the retarded children admitted to our Special Schools are charged $252.00 for the first thirty days in the school and $144.00 per month thereafter. This represents a per diem charge of $8.40 per day for the first 30 days and $4.70 per day thereafter. This is the actual cost of the care, treatment and training of the particular child.

A very small number of parents pay for the cost of the care of their children, even at the above low rates. We receive complete payment of from only five to a maximum of ten per cent of the parents during any given month. Some parents pay a part of the costs, but approximately forty-eight per cent make no effort and pay nothing toward the cost of the child's care.

In the mental hospitals, a similar situation exists. The actual cost of keeping a person in our mental hospital is $348.00 for the first 30 days and $132.00 per month thereafter. The cost is greater during the first thirty days because of extra tests, examinations, and attention given in trying to diagnose, analyze tests and determine the best course of treatment.

A very small number of these patients pay for the cost of their care. 8 per cent on an average pay all charges and 28 per cent pay a part of the charges. The remainder pay nothing (64 per cent).

L. It is our opinion that the only solution that our Agency would have should we be subject to the Fair Labor Standards Act, in the absence of an additional appropriation, would be to close some of our Special Schools and release a large number of the inmates of our mental hospitals We depend entirely on the appropriation made by the Legislature of Texas from tax money of the State to pay our operating expenses, as the collections from our "patients" are insignificant.

M. The Mental Hospitals and Special Schools as thus organized and functioning use and consume all supplies and equipment purchased for them and do not resell any of these items.

Coordinating Board, Texas College and University System. If Dr. Jack K. Williams, Commissioner of Higher Education and Ray A. Fowler, Assistant Commissioner, were present and under oath, they would testify as follows:

A. Organization. The Coordinating Board is a State Agency created to supervise and coordinate Public Senior Colleges and Universities and to assume responsibility for the creation of Texas Public Junior College Districts and the developments of the Colleges therein. The latter duty is shared with the State Board of Vocational Education which approves new certificate programs in technical and vocational education. Article 2919e-2, Vernon's Texas Civil Statutes, known as the Higher Education Coordinating Act of 1965, attached as Exhibit 7 hereto, sets out in detail the organization and duties of this agency. The total estimated 1966 Fall head-count enrollment in Public Senior Colleges and Universities in Texas totals 183,594 students. Should these institutions be held subject to the Fair Labor Standards Act, the State will necessarily have to appropriate an additional $3,295,884.00 at the present time to comply with the terms and conditions. This does not include cost which would be charged to the students ranging from a board charge of from $36.00 per student at one institution to a room and board charge of an additional $100.00 per semester at another. The estimated cost to the State per college is attached hereto as Exhibit No. 9.

B. The Annual Report of this Agency for the fiscal year ending August 31, 1966 lists grants recommended and received by Universities in the State of Texas and also lists research projects approved by the Coordinating Board. This report is attached hereto as Exhibit No. 8.

C. All materials and supplies are purchased for Universities and Colleges by the Board of Control.

D. Junior Colleges are operated by Public Junior College Districts — each having taxing power, each electing its own Board of Trustees who have the authority to set the tax rate, fix salaries, determine courses of instruction, and provide buildings and other facilities.

E. Junior Colleges operate in the manner as Independent School Districts with the exception that free textbooks are not furnished to the students by the State, but they must purchase their own. Most Junior Colleges order the necessary books for the student, with the student paying the exact cost of the books. The State, however, does grant direct aid to each Public Junior College for the purpose of supplementing salaries of instructional personnel only and the purchase of supplies and materials for instructional purposes. This aid is conditioned on the particular Junior College meeting requirements of the Coordinating Board as to standards of instruction and curricula. Approximately $14,000 has been appropriated for this purpose for the year ending August 31, 1967. The money appropriated, however, can be used only for the limited purpose stated above.

F. Two hospital systems are under the direction of the University of Texas System. These are those relating to the Medical Branch at Galveston, Texas, and M. D. Anderson and Tumor Institute at Houston, Texas. These are teaching hospital units and, of course, operate at a loss. Less than 45% of the people received as patients at the Medical Branch at Galveston pay the total cost of their hospital services and less 40% of the patients received at the M. D. Anderson Hospital pay the total cost for services rendered to them.

G. Medicines and Supplies are purchased by the Board of Control as for other hospitals operated by the State. Approximately 18,000 patients were treated at Galveston during the past fiscal year and approximately 500 patients were treated at the M. D. Anderson Hospital.

H. A list of publications published by the University of Texas is attached hereto as Exhibit 10. Some of these publications are free and a small charge if made for others. All of these publications are printed as a public service, however, and none of them pay their own way, but must be subsidized from funds of the particular department publishing them. Records are not maintained as to what percentage of these publications may be mailed out of the State. Only a small percentage of publications are mailed

to persons outside of the State, but requests for publications are usually filled regardless of whether or not the person making the request is a resident of Texas or some other State. Publications are also exchanged with out of state universities when other universities are doing research in the same or similar fields.

I. Attached hereto as Exhibit 11 are a list of the research contracts of the University of Texas System.

VI.

Texas Education Agency. If present and under oath, Dr. J. W. Edgar, Director of the Texas Education Agency, and J. B. Golden, Director of the Textbook Division, Texas Education Agency, would testify as follows:

A. Textsbooks for Public Schools. All records of textbooks are kept in the regular course of operation of the Textbook Division of the Texas Education Agency.

Article 2866, Texas Revised Civil Statutes, requires that the State provide free textbooks to the students that attend the public schools in Texas. After each textbook has been selected and adopted, the Textbook Division then negotiates contracts with the respective agents (all of whom reside in Texas) of the publishers. The agents of the publishers make all arrangements for the publishers. Two publishers print their books in Texas, the remainder are printed outside of Texas, so far as we know. Each publisher is required by law (Article 2861, Texas Revised Civil Statutes) to establish and maintain a depository in Texas for the purpose of storing the textbooks for later distribution. Three of the larger publishers, namely Ginn and Company, D. C. Heath and Company and Houghton Mifflin Company, operate their own depository located in Dallas, Texas. All of the other publishers use either the Lone Star School Book Depository or the Texas School Book Depository, privately owned companies located in Dallas, for the purpose of storing their books. Each publisher is required to keep a sufficient number of books in storage in their respective depositories to meet the demands of the local school dis-

tricts from year to year. Each local district in the State requisitions the Texas Education Agency, Textbook Division, in Austin for the type, title and number of books needed to operate the local schools. Upon approval of such requisitions the Textbook Division directs the publisher's depository to make shipment direct from the depository to the local district. More than 99% of all books purchased outside of the State come to rest and remain in storage in the depositories for periods of weeks, months and sometimes longer. Less than 1% of the books are shipped direct from the publisher to the local school.

The following table indicates by years the number of books purchased, and total cost and the percentage that are shipped direct from the publisher to the local schools:

Year	*Number of Books Purchased*	*Annual Cost*	*Direct Shipments Percentage*
1960-61	6,513,137	$ 8,417,420	.093
1961-62	4,423,435	7,456,128	.208
1962-63	4,741,052	10,145,435	.....
1963-64	4,513,002	9,288,619	.....
1964-65	5,625,236	11,788,452	.087
1965-66	6,368,983	16,062,136	.287

* * * * * *

VIII.

Bexar County Hospital District. If William B. Forster, FACHA, Administrator of Robert B. Green Hospital, were present and placed under oath, he would testify as follows:

A. Organization. The Bexar County Hospital District is a Hospital District organized under the laws of the State of Texas. Its Governing Board is appointed by the Commissioners Court of Bexar County and operates Robert B. Green Memorial Hospital, and its operation is fairly typical of the public hospitals of the State of Texas, except that we feel that because of a large amount of property owned by the United States Government in Bexar County, which is

exempt from taxation, that this would cause lower tax rolls than would be expected and thereby, to some extent, limit the maximum ad valorem yield.

B. Financing. The hospital is financed through the collection of ad valorem taxes plus other small collections, which include Medicare, State Welfare Department aid, and collections from patients where possible. The budget of the hospital is $5,136,054.51 per year and of this amount, 5.9% came from patients. In other words, approximately 94% of the patients pay none of their hospital charges. It is not the policy of the hospital to charge paying patients more than actual cost of their cost of their care to help pay the cost of those who pay nothing. This hospital has 328 beds in the general hospital plus 96 bassinets. The Nursing Home has 250 beds. During the last fiscal year, there were 13,342 admissions, 3,053 were births.

C. Supplies. Medicines and drugs purchased from whatever supplier quotes the best price. Preference is given to local firms whose prices are equal or better than out of county firms. The same holds true for the other supplies, including food served to patients. We always attempt to purchase from the lowest bidder whether from in the county, out of the county or out of the State. We do not keep any record, however, of out of State purchases as distinguished from local purchases, and we, of course, are not concerned with whether goods purchased from local dealers are manufactured outside of the State or not.

D. Employees. The hospital employes 843 persons. Of this number 560 make less than $1.60 per hour as shown by Exhibit No. 20. Employees do not work longer than a 40 hour work week except in very unusual circumstances, which would include when other employees become ill, sometimes in the laundry and sometimes in the operating room when operations run longer than schedule. Without taking overtime into consideration, it will ultimately cost the hospital approximately $493,000 per year to comply with the Minimum Wage provisions of the Act as reflected by Exhibit No. 20. This does not take into consideration any growth factor. The hospital tax levy is now at ap-

proximately the maximum rate that is allowed by law. If the hospital is subject to the Fair Labor Standards Act, it is our opinion that it will be necessary for us to curtail services. The Hospital Board cannot raise county valuations. If county valuations were raised, the tax payers would be paying additional money, not only for the hospital, but also for all other taxing units depending on these assessed values. For this reason, it is very unlikely that there will be a revaluation of all property in the county in order to provide these extra funds for the hospital. It is much more likely that we will be ordered to curtail our services to the poor.

IX.

A. Dr. Abner McCall, President of Baylor University, Waco, Texas, if present and placed under oath would testify to the following:

I am President of Baylor University and have been in the field of education as a college professor and administrator for over 25 years. I have been active in the affairs of church-related schools and colleges and non-public institutions of higher learning in the State of Texas, and am presently serving as president of the association composed of these institutions. I feel that I am thoroughly familiar with the problems and affairs of this type institution. In our opinion, public-supported junior colleges and institutions of higher learning are not in competition with our institutions. At the present time none of the private institutions in Texas have facilities to care for more students, and we are having to increase our standards for admission in order to eliminate a lot of those students who would like to enter our institutions. For us to be able to take more students we would have to find a source of money from foundations or private individuals who would build us more dormitories and classroom facilities. The tuition charged the student takes care of only a small part of the cost of operating the institution. For this reason we encourage students to attend junior colleges if possible, or other public institutions. Should the public institutions

close their door we would not be able to take care of the students now in attendance at these public institutions.

B. If Curtis C. Ramey, President of Forth Worth Christian College, Fort Worth, Texas, were placed on the witness stand and placed under oath, he would testify to the following:

Fort Worth Christian College is an institution of higher learning located in Fort Worth. The college is a private junior college governed by a self-perpetuated Board of Trustees. The only source of revenue for the operation of the college are gifts, income from endowments, tuition from students, and income from dormitory rentals and cafeteria operations. If the tax-supported institutions in the area should for any reason close, and our college found itself with a large number of students desiring entrance, the only way this could be accomplished would be for us to receive gifts for the purpose of constructing additional buildings, facilities and classrooms. We do not have such money available, nor in contemplation. Likewise, we do not have additional space on our campus to build additional buildings. The tuition of our college for students amounts to the sum of $19.50 per semester hour. This is much higher than the tuition of tax-supported institutions in the immediate area. Our college is not in competition with tax-supported state institutions in this area, nor in any other section of the State of Texas. We now have all the students we can comfortably accommodate. In my opinion this is the same situation that exists in connection with all other private junior colleges.

C. James H. Stewart, Jr., Superintendent of Masonic Home Independent School District, Fort Worth, Texas, if placed under oath would testify to the following:

The Masonic Home and School of Texas is located at Fort Worth, Texas. It now has 249 students. The School is operated by the Masonic Home Independent School District, which was created as an Independent School District under the laws of the State of Texas in 1913. It is governed by a Board of Trustees consisting of three members who serve without compensation for indefinite terms. To be

eligible to attend school at Masonic Home Independent School District, the child must reside in the Masonic Home and School of Texas. To secure admission, the applicant must be the child or grandchild of a Master Mason in good standing in a subordinate lodge in Texas, and may be admitted only because the father is deceased, incurably ill, insane, or other similar conditions which would deprive the child of a proper home. Although we are classed as a private school, we do not feel that the Forth Worth Independent School District is in any way in competition with our operation. Since we are very selective in the children that we receive, we would not be in a position to accept students in general from the Fort Worth Independent School District should it cease operation.

D. Mr. Law Sone, President of Texas Wesleyan College, if present and placed under oath, would testify to the following:

I am President of Texas Wesleyan College, an institution of higher learning located in Fort Worth, Texas. The College is related to the Methodist Church, but it operates under the jurisdiction of its own Board of Trustees. I am familiar with the operation of institutions of like character in the State of Texas. The only source of revenue for the operation of the college and institutions of like character are gifts, income from endowments, tuition from students and income from dormitory rentals and cafeteria operations. At the present time, the college has approximately 2200 students which is the total capacity of its facilities. If the tax-supported institutions in the area should for any reason close and we had a large number of applicants from people in the area, the only way that we would be of service would be for us to receive gifts which would enable us to construct additional buildings, facilities and classrooms. We do not have such money available nor in contemplation. Likewise, we do not have adequate space on our campus to build additional buildings. Tuition of our college per student amounts to the sum of $25.00 per semester hour. This tuition cost is much greater than the cost of the tax-supported institutions. We do not feel that the tax-supported institutions in the State of Texas are in any way.

in competition with out institution as we have all the students that we can handle.

X.

It is hereby stipulated that as of February 1, 1967, the provisions of the Fair Labor Standards Act, 29 U.S.C. Sec. 201, et seq., may be applicable to the following agencies and political subdivisions of the State of Texas or a portion of the employees thereof: The Texas Youth Council, The Department of Health, The Texas Department of Mental Health and Mental Retardation, the various Independent School Districts operating public school for elementary and secondary education, the public hospitals operated by political subdivisions of the State of Texas, the Junior Colleges operated by various Junior College Districts and the institutions of higher education operated by the State of Texas subject to the determination of this cause of action and other judicial interpretations of their functions. The Wage and Hour and Public Contracts Divisions of the United States Department of Labor is charged with the enforcement and application of the Fair Labor Standards Act, as amended, and subject to regulations promulgated by the Department of Labor, the orders of this Court and/or courts of competent jurisdiction will apply and enforce the provisions of the Fair Labor Standards Act, as amended, to the above institutions and schools of the State of Texas. These agencies and political subdivisions in the operation of schools, hospitals and other institutions are implementing the duties and responsibilities delegated to them by the statutes and Constitution of the State of Texas (and are engaged in functions which are governmental in nature.) These agencies in the exercise of their function use various quantities of goods and supplies which are produced outside of the State of Texas. These goods and supplies are essential to the furtherance of these agencies and political subdivisions' promotion and administration of the health, safety and welfare of the citizens of Texas and are used and consumed entirely by the agencies and political subdivisions as previously set forth. The nature of the duties and responsibilities of the various agencies and po-

litical subdivisions, the volume and nature of goods and supplies purchased by or for their use, and the manner of purchasing for each appears above.

(Signatures.)

EXHIBIT 5

* * * * * *

ANNUAL REPORT

TUBERCULOSIS CONTROL SERVICES

* * * * * *

A major problem faced by all activities of the Tuberculosis Control Program during the past fiscal year was the recruitment and retention of qualified medical, paramedical, and service personnel. Fierce competition, an abnormal low rate of unemployment, and continued economic growth in the areas surrounding each tuberculosis hospital made certain categories of health personnel extremely difficult, if not impossible, to recruit. During the first quarter of the fiscal year 1965-66 a sharp upward trend was noticed in the turnover rates in the four institutions. The turnover rate continued to rise steadily and reached alarming proportions during the third and fourth quarters. In fact, San Antonio Tuberculosis Hospital reached 9.6 percent turnover in July and 9.1 percent in August, 1966. A turnover rate in excess of 3 percent is considered by most economic and business experts to be critical to efficient operation and stability. By the end of the fiscal year 1965, San Antonio's turnover rate for the year was 53.61 percent; East Texas was 44.06 percent, McKnight 42.80 percent, and Harlingen 31.82 percent, an average personnel turnover in the four hospitals of 43%.

A combination of uncontrollable factors contributed to this extremely high and non-productive turnover rate. State salaries which had been equal to or above average local wages were suddenly found to be well below the beginning salaries paid to workers in industries, private

hospitals, and other business organizations surrounding the hospitals. Despite the salary increase in September, 1965, the middle of the year found 57 percent of the hospital employees earning less than $3,000 per year. Rising costs of living and the aforementioned competition forced not only new applicants to shun employment, but caused a significant number of older employees to seek employment where the monetary rewards were far greater. The increased turnover rates were not confined to the low salary groups. Difficulty has been experienced in recruiting and retaining trained professional employees in such categories as nursing, laboratory, x-ray and physicians. Throughout the year the four tuberculosis hospitals have had an average of 10 to 12 nursing vacancies every month. Twenty-five percent of the Medical Technologist positions remained vacant throughout the year. Registered Therapists and Caseworkers were extremely hard, if not impossible, to recruit due to the low salary structure being offered these classes. The Personnel Officers of the four tuberculosis hospitals and the Central Office Personnel Division intensified recruiting efforts in every possible way, but despite all the efforts expended on recruiting and retention, the number and types of vacancies at the end of the fiscal year were greater than those at the beginning.

* * * * * * *

STIPULATION

Without conceding the relevancy and materiality thereof, the parties hereby stipulate that the statements of facts and figures set forth herein and in the exhibits attached hereto may be accepted by the Court and may be received as evidence in this case.

1. Recognizing that available statistics are not always current and that the time for preparation available to the parties herein has been limited, it is stipulated and agreed that the facts and figures referred to above and included in or attached to the separate stipulations dealing respectively with the States of Maryland, Texas and Ohio may be treated as representative and typical as to all the plaintiff States (including the political subdivisions thereof)

and for all times material hereto. It is recognized and agreed that said facts and figures as supplied by the States do not include all types of materials, supplies and equipment used in the operation of schools and hospitals within said States.

2. It is further agreed and stipulated that plaintiffs herein do not accept or agree to or consent that they or the Court shall be bound by any inferences, opinions and conclusions herein expressed or by any statements of ultimate fact which are not supported by basic facts.

3. Defendants' exhibits are as follows:

Exhibit A: Material prepared by the Wage and Hour and Public Contracts Divisions' Division of Research and Legislative Analysis from authoritative source material such as technical publications and official reports of various Government Agencies and Bureaus, as follows:

1. Material pertaining to Maryland schools (attachments A through K) and hospitals (attachments A, B, C and E).

2. Material pertaining to Texas schools (attachments A through K) and hospitals (attachments A, B, C and E).

3. Material pertaining to Ohio schools (attachments A through K) and hospitals (attachments A, B, C and E).

4. Material pertaining to schools (attachments A through H) and hospitals (attachments A, B, C and E) throughout the United States.

Exhibit B: Statements and/or affidavits by officials of various Government Agencies and Bureaus and official publications, as follows:

1. Programs Administered by the U.S. Office of Education, Fiscal Year 1967.

2. Programs and Services, U.S. Department of Health, Education and Welfare (February, 1966).

3. Grants-in-Aid and Other Financial Assistance Programs, U.S. Department of Health, Education and Welfare (1966 Edition).

4. Tenth Annual Report on Health Research Facilities by the Surgeon General of the Public Health Service, House Document No. 496 (89th Congress, 2d Session, September, 1966).

5. Senate Report No. 146 (89th Congress, 1st Session, April, 1965).

6. Subcommittee Print prepared for the Special Subcommittee on Education, Vol. II (U.S. Government Printing Office, March, 1966).

7. Subcommittee Print prepared for the Special Subcommittee on Education, Vol. I (U.S. Government Printing Office, March, 1966).

8. Letter from Director of School Lunch Division, U.S. Department of Agriculture to Solicitor of Labor, U.S. Department of Labor, Dated February 23, 1967. Chart and pamphlet.

9. Report of Subcommittee on Employment and Manpower, Committee on Labor and Public Welfare, U.S. Senate (88th Congress, 2d Session, 1964).

10. Stipulation-statement of Mr. Charles M. Zellers, U.S. Office of Education.

11. Stipulation-statement of Mrs. Agnes W. Brewster, U.S. Public Health Service.

Exhibit C: Sample statements and catalogues from a number of firms which sell and distribute school and hospital supplies, as follows:

1. Will Ross, Inc.: Letter dated 2/13/67
   Letter dated 2/15/67
   Letter dated 2/22/67
   and catalogue
2. W. A. Kyle Company: Letter dated 2/17/67
3. W. S. White Company: Letter dated 2/17/67

4. Leicy's Incorporated: Letter dated 2/13/67
5. E. A. McClure Company: Letter dated 2/13/67
6. Stanley Supply Company, Inc.: Letter dated 2/13/67
7. Southern Precision Instrument Co.: Letter dated 2/9/67; partial list of SPI Microscope Users; catalogues
8. Lycett, Inc.: Letter dated 2/2/67 and catalogue

4. It is further agreed and stipulated that each of the plaintiff States (including the political subdivisions thereof) employs in its schools and hospitals in carrying out the functions thereof persons who are variously engaged in ordering, purchasing or otherwise procuring directly or indirectly from sources outside the State certain quantities of a large variety of materials, supplies and equipment for use in said schools and hospitals, and/or in receiving, handling, distributing, dispensing or otherwise working on, paying for and keeping books concerning said items. Certain persons employed by each of plaintiff States (including the political subdivisions thereof) in most schools and hospitals are also variously engaged in corresponding and otherwise communicating with students, prospective students, professors, nurses, doctors and other school and hospital personnel in other States and with organizations or associations thereof, and with representatives of the United States Government in Washington, D. C., and elsewhere, and in the preparation of certain items which are being transmitted from one State to places in other States.

(Signatures of Counsel.)

DEFENDANTS' EXHIBIT A-1

MARYLAND SCHOOLS

General

More than two-thirds of the elementary and secondary schools in Maryland are public schools. They account for more than four-fifths of the total enrollment (Attachment A).

The 27,000 classroom teachers in 1963-64 made up the great majority of personnel employed by the public elementary and secondary school system. The next largest group of employees — somewhat over 6,000 — was concerned with plant operation and maintenance (Attachment B). In the fall of 1966, public schools accounted for 85 percent of all classroom teachers (Attachment C).

Public institutions of higher education are less than half of the total of such institutions, but account for two-thirds of the enrollment (Attachment D).

Expenditures and Receipts

In 1963-64 total current expenditures in elementary and secondary schools were $310 million, capital outlay was $87 million, and interest on school debt was $17 million. By 1966-67 these figures had increased by 42 percent, 14 percent, and 38 percent, respectively. Expenditures for instruction comprised more than two-thirds of total expenditures (Attachment E).

Expenditures for school equipment and supplies, excluding capital outlay and payments for fuel, power and light, were about $14 million in the 1961-62 school year. Expenses connected with instruction and textbooks comprised almost two-thirds of the total (Attachment F).

Of 1,046 suppliers of major items of school equipment listed in *P/I, Product Information for Schools,* February-March 1965, only 4 are located in Maryland. Of more than 500 suppliers of other items of school equipment, another 4 are in Maryland (Attachment G). Only three of these 8 firms have assets of over $1 million, and these are in very general product categories, not specifically related to school supplies and equipment (Attachment H).

Maryland elementary and secondary public schools derived 6 percent — $22 million of their total revenue receipts (appropriations, taxes, endowments and the like) from the Federal government in 1963-64 (Attachment I). A total of more than $67 million in Federal funds was channeled into Maryland for education and related activities at all levels

of instruction in fiscal year 1965, including $9 million for health related training and $7 million for school lunch and milk, in addition to the $23 million for elementary and secondary school education and $16 million for higher education (Attachment J).

In the fall of 1963, more than 13,000 students from outside of Maryland were studying at Maryland colleges (Attachment K).

Maryland Hospitals

General

Of a total of 86 hospitals in Maryland, 19 are State and local government hospitals. These account for more than half of the beds in all hospitals, but less than 15 percent of the total admissions (Attachment A).

State and local hospitals also have about 30 percent of the full-time personnel in all hospitals. The average annual wage for these personnel was $4,253 in 1965, considerably less than the $6,406 average in Federal hospitals. These figures exclude residents, interns, and students, however, and the Federal hospitals may show a higher wage because of the inclusion of staff physicians (Attachment B).

Expenditures and Receipts

Thirty-two suppliers of hospital supplies and equipment were listed for Maryland in the *Hospital Purchasing File*, 1963 edition. These represent about 1 percent of all the suppliers listed. Only three of these with main offices in Maryland have total assets of over $1 million. Two others have assets of over $300,000 (Attachment C).

The three largest firms produce and supply business forms, cold storage doors, and pharmaceuticals. The next two largest firms produce and supply animal laboratory apparatus and printed materials. It seems reasonable to conclude that a significant proportion of the supplies and equipment necessary to the operation of hospitals in Maryland are produced, supplied, or both, by out-of-state firms.

Federal aid payments by the Public Health Service to individuals and private institutions in Maryland totaled almost $25 million in fiscal year 1965. Allocations or grants by the Public Health Service to State agencies and local units in Maryland totaled more than $5 million in fiscal year 1966. About two-thirds went for hospitals and medical facilities (Attachment E).

1162

MARYLAND HOSPITALS

Attachment B

Expenditures and average annual wage of full-time personnel, by type of hospital, 1965

Classification	Number of hospitals	Total expenditures (000)	Payroll expenditures (000)	Number of full-time personnel 1/	Average annual wage 2/
All Maryland hospitals	86	$270,381	$184,856	41,715	$4,431
Federal hospitals	12	51,850	41,698	[redacted]	[redacted]
Nonfederal hospitals	74	218,531	143,158	35,206	4,066
State and local government	19	71,800 3/	52,847	12,425	4,253
Short term	5	27,115	18,758	4,660	4,025
Psychiatric and mental retardation	8	33,336	25,369	5,822	4,357
Tuberculosis	3	6,550 3/	4,828	1,018	4,743
Other long term	3	4,816	3,892	925	4,208
Nongovernment	55	146,700 3/	90,311	22,781	3,964

1/ Includes full-time personnel plus full-time equivalents of part-time personnel. Excludes residents, interns, and students.
2/ Average annual wage calculated from number of full-time personnel and payroll expenditures.
3/ Approximate figures.

Source: Hospitals, Journal of the American Hospital Association, August 1966.

DEFENDANTS' EXHIBIT A-2

TEXAS SCHOOLS

General

Ninety percent of the elementary and secondary schools in Texas are public schools. They account for more than 94 percent of the total enrollment (Attachment A).

The 95,000 classroom teachers in 1963-64 made up the great majority of personnel employed by the public elementary and secondary school system. The next largest group of employees — about 18,000 full and part-time workers was food service personnel, followed by plant operation and maintenance personnel, about 15,000 (Attachment B). Classroom teachers in public schools were 94 percent of the total in the fall of 1966 (Attachment C).

Public institutions of higher education are a little more than half of the total of such institutions, but account for more than three-fourths of the enrollment (Attachment D).

Expenditures and Receipts

In 1963-64, total current expenditures in public elementary and secondary schools were $844 million, capital outlay was $165 million, and interest on school debt was $43 million. By 1966-67 these figures had increased by 22 percent, 3 percent, and 12 percent, respectively. Expenditures for instruction comprised well over half of total expenditures (Attachment E).

Expenditures for school equipment and supplies, excluding capital outlay and payments for fuel, power and light, were about $44.5 million in the 1961-62 school year. Expenses connected with instruction and textbooks comprised over one-half of the total (Attachment F).

Of 1,046 suppliers of major items of school equipment listed in *P/I Product Information for Schools*, February-March 1965, only 25 are located in Texas. Of more than 500 suppliers of other items of school equipment, another 12 are in Texas (Attachment G). Seven of those Texas

firms have assets of over $1 million, and only three of these deal primarily with school equipment. (Attachment H).

Texas elementary and secondary public schools derived 4.6 percent — $50 million of their total revenue receipts (appropriations, taxes, endowments and the like) from the Federal government in 1963-64 (Attachment I). A total of almost $131 million in Federal funds was channeled into Texas for education and related activities at all levels of instruction in fiscal year 1965, including $23 million for school lunch and milk and $13 million for vocational-technical training (Attachment J).

In the fall of 1963, more than 22,000 students from outside of Texas were studying at Texas colleges both public and private. This was more than 5,000 more than the number who left Texas to study in another State (Attachment K).

Texas Hospitals

General

Of a total of 556 hospitals in Texas, 144 are State and local government hospitals. These account for almost half of the beds in all hospitals, and about one-fourth of the admissions (Attachment A).

State and local hospitals also have about 30 percent of the full-time personnel in all hospitals. The average annual wage for these personnel was $3,418, about $500 less than the average for all hospitals (Attachment B).

Expenditures

Forty-six suppliers of hospital supplies and equipment were listed for Texas in the *Hospital Purchasing File*, 1963 edition. These represent about 2 percent of all the suppliers listed. Ten of these have assets of over $1 million, and most of these ten are involved specifically in the production or supply of both, of hospital equipment and supplies. (Attachment C).

Allocations or grants by the Public Health Service to State agencies and local units in Texas totalled almost $24

million in fiscal year 1966. More than two-thirds went for hospitals and medical facilities (Attachment E).

DEFENDANTS' EXHIBIT A-3

OHIO SCHOOLS

General

More than four-fifths of the elementary and secondary schools in Ohio are public schools and they account for a like proportion of pupils (Attachment A).

The 78,000 classroom teachers in 1963-64 made up the great majority of personnel employed by the public elementary and secondary school system. The next largest group of employees was made up of plant operation and maintenance personnel, about 14,000. Full-time and part-time food service personnel accounted for another 11,500, and there were 6,000 secretarial and clerical personnel (Attachment B). Classroom teachers in public schools were 88 percent of the total in the fall of 1966 (Attachment C).

Public institutions of higher education are only 16 percent of the total of such institutions, but account for almost two-thirds of the enrollment (Attachment D).

Expenditures and Receipts

In 1963-64 total current expenditures in public elementary and secondary schools were $954 million, capital outlay was $159 million, and interest on school debt was $36 million. By 1966-67 these figures had increased by 7 percent, 17 percent, and 37 percent, respectively. Expenditures for instruction comprised well over half of total expenditures (Attachment E).

Expenditures for school equipment and supplies, excluding capital outlay and payments for fuel, power and light, were about $42.7 million in 1961-62 and $59.5 million in 1963-64. Expenses connected with instruction and textbooks comprised over one-half of the total in the latter year (Attachment F).

Of 1,046 suppliers of major items of school equipment listed in *P/I, Product Information for Schools,* February-March 1965, 86 are located in Ohio. Of more than 500 suppliers of other items of school equipment, another 44 are in Ohio (Attachment G). There are certain categories of products, such as book publishers and distributors, which have only a small number of firms or no firms located in Ohio. About half of these Ohio firms are large in size, having assets of over $1 million. (Attachment H).

Ohio elementary and secondary public schools derived 3 percent — $27 million of their total revenue receipt (appropriations, taxes, endowments and the like) from the Federal government in 1963-64 (Attachment I). A total of $126 million in Federal funds was channeled into Ohio for education and related activities at all levels of instruction in fiscal year 1965, including $25 million for school lunch and milk and $17 million for vocational-technical training (Attachment J).

In the fall of 1963, more than 42,000 students from outside of Ohio were studying at Ohio colleges. This was more than 8,000 more than the number who left Ohio to study in another State (Attachment K).

Ohio Hospitals

General

Of a total of 256 hospitals in Ohio, 76 are State and local government hospitals. These account for almost half of the beds in all hospitals, and about 15 percent of the admissions (Attachment A).

State and local hospitals also have about one-fourth of the full-time personnel in all hospitals. The average annual wage for these personnel was about $4,200 in 1965 (Attachment B).

Expenditures and Receipts

Almost 250 suppliers of hospital supplies and equipment were listed for Ohio in the *Hospital Purchasing File,* 1963

edition. These represent less than 10 percent of all the suppliers listed. There are certain categories of products, such as pharmaceuticals and laboratory equipment, which are made or supplied by only a small number of firms located in Ohio. (Attachment C).

Almost $18 million was allocated or granted by the Public Health Service to State agencies and local units in Ohio in fiscal year 1966 for such projects as hospitals and medical facilities ($12 million) and construction of community mental health centers ($2.5 million).

DEFENDANTS' EXHIBIT A-4
(Attachment B)

1222

HOSPITALS, UNITED STATES

Attachment B

Expenditures and average annual wage of full-time personnel, by type of hospital, 1965

Classification	Number of hospitals	Total expenditures (millions)	Payroll expenditures (millions)	Number of full-time personnel 1/ (000)	Average annual wage 2/
All hospitals in U.S.	7,123	$12,948.1	$8,551.4	1,952.4	$4,380
Federal hospitals	443	1,567.6	1,264.1	[redacted]	[redacted]
State and local government	2,041	3,922.5	2,744.8	626.5	4,381
State	546	1,969.0	1,458.2	330.9	4,407
County	854	958.9	631.9	154.6	4,087
City	339	671.9	455.1	88.6	5,137
City-county	77	111.0	72.7	18.1	4,017
Hospital district	225	211.7	126.9	34.3	3,700
Nongovernment	4,639	7,458.0	4,542.5	1,127.4	4,029
Voluntary non-profit	3,670	6,888.6	4,247.2	1,050.2	4,044
Proprietary	969	569.4	295.3	77.2	3,825

1/ Includes full-time personnel plus full-time equivalents of part-time personnel. Excludes residents, interns, and students.

2/ Average annual wage calculated from number of full-time personnel and payroll expenditures.

Source: Hospitals, Journal of the American Hospital Association, August 1966.

DEFENDANTS' EXHIBIT C

* * * * * *

W. A. Kyle Company

115 Hyde Park Blvd,
Houston, Texas 77006

February 17, 1967

Via Air Mail

Mr. James M. Miller
Deputy Associate Solicitor,
U. S. Department of Labor
Room 4135
14th and Constitution Avenue, N.W.
Washington, D. C. 20210

Re: *State of Maryland, et al. v. Wirtz, et al.*

USDC D. Md. — Civil No. 18005

Gentlemen:

Please refer to your form letter dated February 7 with reference to the captioned subject. We are answering your questions from your letter to the best of our ability with the same reference numbers but wish to assure you that statistical information which we maintain does not give the complete answers:

(1) We do not have a catalog available. We supply hospitals with capital equipment such as bedroom furniture, operating room furnishings, nurses station equipment, and miscellaneous equipment for the hospital other than certain house keeping and X-ray equipment.

(2) We estimate our sales to city, county, and state institutions within the State of Texas to amount to possibly $75,000.00 per year.

(3) We estimate total purchases by us outside of the State of Texas to represent a dollar volume of $1,700,000.00.

(4a) We estimate an inventory turn over of approximately 6 and ½ times per year over all. We estimate that out of a total yearly volume of 2 and ½ million dollars that approximately ½ million dollars is ordered out after obtaining orders from customers to cover items which we normally do not stock. Generally these items (ordered out) are capital equipment.

(4b) We estimate approximately $150,000.00 annually of (4a) represents drop shipments and usually involves only capital equipment.

Trusting that this information proves helpful, we remain

Very truly yours,

W. A. KYLE CO. — HOUSTON
W. J. MARONEY

WJM/ma

W. S. White Co.
2015 Ninth Street
Wichita Falls, Texas

February 17, 1967

Mr. James M. Miller
Deputy Associate Solicitor
U. S. Department of Labor, Room 4135
14th and Constitution Avenue, N.W.
Washington, D. C. 20210

Dear Mr. Miller:

Due to my absence from the office, your letter of February 7th, relative to the *State of Maryland, et al. v. Wirtz, et al.* USDC D .Md. — Civil No. 18005, has only now been brought to my attention. We shall do our best to provide the information you request; however, our bookkeeping system does not lend itsself to the exact breakdown of sales figures you seek. Therefore, we will do our best to approximate our answers as accurately as possible.

Question No. One. We supply all types of equipment, i.e., operating tables, delivery tables, examining tables, hospital beds, anethesia machines, pumps, sterilizing equipment, instruments etc. for use in hospitals, as well as expendable, or supply, items such as bandages, dressings, I.V. solutions, syringes and needles, liquid sterilizing agents, rubber gloves, catheters, Kleenex etc. We have issued a catalog in the past, and many are still in the possession of our customers, but we have not issued one since 1964, and our supply at this time is completely exhausted. Thus, we do not have a copy to enclose herewith.

Question No. Two. Our total dollar volume of sales to state, county or municipal hospitals, within the State of Texas, for the calendar year 1966, was approximately $300,000.00.

Question No. Three. It is estimated that $240,000.00 worth of these goods are manufactured outside of the State of Texas. However, a number of manufacturers warehouse within the state, and we order from these warehouses where possible, although the goods are actually manufactured elsewhere. About $40,000.00 worth of the $240,000.00 total are thus secured from warehouse facilities within the state.

Question No. Four. Part (A) We attempt to supply all expendable items, and emergency equipment items, from our stock. Between 70% and 75% of our orders are thus filled directly from our warehouse, 10%-15% are drop shipped, and the balance is shipped from our stock room after receipt of same from the manufacturer, either as a back order, or as a special order.

Question No. Four. Part (B) Approximately 10% of our orders are drop shipped, and we estimate that 90% of our drop shipments are from manufacturers outside the State of Texas. Drop shipments consist mainly of major equipment items, items fabricated especially for a particular job etc., or non-stable products with short expiration dates such as sheep cells, blood fractions etc.

Included in this category is also bulk shipments of large orders of bandages, dressings, paper products etc.

Although we have answered mostly in approximations and estimates, we believe our answers to be very close to accurate, and trust that we have provided the desired information herein.

Sincerely,

W. S. WHITE Co.
W. S. WHITE

Leicy's
Incorporated

1531-1533 W, Market St.
Steubenville, Ohio

February 13, 1967

Mr. James M. Miller
Deputy Associate Solicitor, U. S.
Department of Labor Room 4135
14th * Constitution Avenue, N.W.
Washington, D. C. 20210

Gentlemen;

In reply to your letter of February 9th, requesting, information regarding our operation, please be advised as follows;

1. Merchandise sold to hospitals, includes, Surgical Dressings, Gloves, Syringes and needles, equipment and medications.
2. Our total volume of sales for 1966 was approximately $750,000.00. We figure at a percentage of sales to hospitals at 60% of the figure.
3. 75% of these good would be obtained outside of the state.

4. (a.) We attempt to stock all items used by our hospital accounts and only make drop shipments in emergencies.

(b.) Drop shipments only if we are out of stock and a drop shipment will save time.

Very truly yours,

J. E. PADDACK

LEICY'S INC.

PHYSICIAN AND HOSPITAL SUPPLIES

E. H. McClure Company

February 13, 1967

Mr. James M. Miller
Deputy Associate Solicitor, U.S. Department of Labor, Room 4135
14th and Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Sir:

Re: State of Maryland, et al. v. Wirtz, et al.
USDC D. Md. — Civil No. 18005

We have your letter of February 7th, and will give you as nearly as possible an answer to the points requested.

1. This year we received the State Award covering the following categories:

a. Minnesota Mining and Manufacturing Company products, including Micropore Tape, Blenderm Tape, Skin Closures, Steri-strips, Surgical Drapes, Autoclaive Indicator Tape, etc.

b. Bard Parker Company Knife Blades, Handles and Antiseptic Solutions.

c. Becton, Dickinson Company Blood Lancets.

d. Anchor Products Company—Surgeons Needles.

e. Becton, Dickinson Company — Universal Interchangeable Glass Syringes, including Insulin and Tuberculin Glass Syringes.

f. Becton, Dickinson Company—Stopcocks, Adapters.

g. Becton, Dickinson Company—Vacutainers.

This contract began on December 1, 1966 and will last for twelve months.

For the previous twelve months' period, we received the State Annual Contract on:

a. Fleets Disposable Enemas.

b. Ames Company and Hyland Laboratories Plasma Diagnostic Reagents.

c. Duke Laboratories, Elastoplast.

d. Minnesota Mining & Manufacturing Company—Microport Tape.

e. C. R. Bard Company, Rubber and Plastic Catheters, including Foley type self-retention.

f. Becton, Dickinson and Company Universal Interchangeable Glass Syringes.

g. Becton, Dickinson and Company, Yale and Super-Ward Needles.

h. Becton, Dickinson and Company Stopcocks and Adapters.

i. Bard Parker Company, Knife Blades, Handles and Antiseptic Solutions.

2. Our approximate total volume of sales to State of Texas Institutions, Dallas County Hospital District, Dallas County Health Department, City of Dallas, City of Dallas Public Schools, Dallas Junior College, and one Federal Institution, the William Beaumont General Hospital of El Paso, is $201,600.00.

This is for a period of seven months, beginning July 1, 1966 through January 31, 1967.

All of these customers are within the State of Texas.

3. The manufacturers described in Item 1 are located outside the State of Texas, and therefore, our answer would be that all of the $201,600.00 merchandise was obtained from manufacturers located outside the State of Texas.

4. Our business is obtained in the general hospital supply field through our salesmen, of whom we have thirteen. Business done, however, with the institutions listed in Item 2, was obtained by formal bids.

4(A) We carry in stock a very large inventory, on which we figure a turnover of approximately seven times a year. Hence, in submitting bids, and making sales through our salesmen, we generally state, "Delivery in 1 to 10 or 12 days", meaning that we normally can fill either all, or at least a part of the order from our stock, the balance to follow by replenishment to our stock.

4(B) We would say that normally 75% of our business is shipped from our stock, the remaining 25% being drop-shipped direct from the manufacturer.

The above refers to any and all supplies and equipment normally used by hospitals, with the exception of X-ray and Major Laboratory Apparatus.

We sincerely trust the above information will be of help.

Yours very truly,

E. H. McCLURE COMPANY,
J. C. RUTLEDGE,
General Consultant.

JCR:r

STANLEY SUPPLY CO. INC.
2121 Butler St.
Dallas, Texas 75235

February 13, 1967

Mr. James M. Miller
Deputy Associate Solicitor
U.S. Dept. of Labor, Room 4135
14th and Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Mr. Miller:

This is in reply to your form inquiry of February 7 re State of Maryland, et al-v-Wirtz, et al.

1. We are a distributor for approximately 700 manufacturers, handling about 32,000 items for sale to doctors and hospitals. We do not have our own catalogue. Our sales force is equipped with manufacturer's catalogues, which have far more detailed specifications than any dealer can afford to have in its own catalogue. We are prepared to supply material to all departments of a hospital except for X-Ray, Pharmacy, maintenance, linen room, laundry and dietary. We supply such diverse items as operating room tables, carpeting, cardiac monitoring equipment and rub lotion.

2. It is virtually impossible to reconstruct our sales to governmental facilities; only as a guesstimate, 65% of our volume is secured from such types of institutions, which, in dollar volume, is approximately $1,600,000 per annum. We operate only within the State of Texas.

3. Virtually 100% of the purchases representing the above volume of sales is secured from outside the State of Texas.

4. A. Approximately 83% of the above volume of sales is shipped from our 3 warehouses in Texas. We

anticipate the requirements of our customers, and due to the critical type of merchandise we supply, service to the customer is of paramount importance. The general exception, representing the other 17% of the total is outlined below.

B. We drop ship approximately 17% of the above volume. This volume is represented by equipment such as patient room furniture, operating room tables, and doctors examining room furniture.

We trust this is the information you require. Please feel free to write should additional facts be necessary.

Sincerely,

STANLEY SUPPLY CO., INC.,
S. JAY STANLEY,
President.

LYCETT, INC.

February 8, 1967

Mr. James M. Miller
Deputy Associate Solicitor
U. S. Department of Labor
Room 4135
14th and Constitution Ave., N.W.
Washington, D. C. 20210

Dear Mr. Miller:

Re: State of Maryland, et al. v. Wirtz, et al.

In response to your inquiry of February 7, we will list approximate answers in the same order as your questions.

1. We are enclosing herewith our school supply catalog. Our lines of merchandise generally fall under the category of teaching aids or activities materials. Most of our merchandise is used at the kindergarten and elementary school level.

2. We would estimate our total volume to public jurisdictions in Maryland to be about $75,000. Many teachers maintain their own accounts with us for which they may or many not be reimbursed by the schools. We could not estimate this type of volume.

3. 99% of our merchandise is manufactured outside of Maryland, and possibly 90% of it is bought and delivered from out of State sources. The remainder would be merchandise which we buy from local jobbers.

4A. Generally speaking, we maintain a substantial inventory to service our customers.

Our rate of turn would be about four, the average for a normal stationery department in a department store. Most of our merchandise is sold "across the counter" but occasionally, where large volume is concerned, we will order from our sources after receiving a firm order from the public jurisdiction.

4B. We do very little drop shipping; possibly six or a dozen instances per year.

Very truly yours,

LYCETT, INC.,
I. C. LYCETT, JR.,
General Manager.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 742

STATE OF MARYLAND, ET AL., *Appellants*

vs.

W. WILLARD WIRTZ, SECRETARY OF LABOR ET AL., *Appellees*

On Appeal From the United States District Court for the District of Maryland

Brief on Behalf of The Fort Worth Independent School District

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SUBJECT INDEX

	Page
ESTABLISHMENT OF PUBLIC FREE SCHOOLS	2
STATE TAX	3
LOCAL TAX	3
NINE SCHOLASTIC MONTHS EACH YEAR	4
STATUTORY REQUIREMENTS	4
AN ANALYSIS OF THE STATEMENT OF EUGENE HIGHTOWER, BUSINESS MANAGER, FORT WORTH INDEPENDENT SCHOOL DISTRICT	5
PERPLEXING PROBLEM	9
TENTH AMENDMENT	10
INTERSTATE COMMERCE	10
CONTROLLING POINT	11
CONCLUSION	12
CERTIFICATE	13

INDEX OF AUTHORITIES

	Page
U. S. Constitution, Article 1, Section 8, Clause 1	12
Texas Constitution, Article 7, Section 1	2, 5
Texas Constitution, Article 7, Section 3	2
Article 2784e, Vernon's Texas Civil Statutes	2, 5, 10
Article 2784e-1, Vernon's Texas Civil Statutes	2, 5, 10
Article 2799, Vernon's Texas Civil Statutes	2, 5
Article 2827, Vernon's Texas Civil Statutes	2
Article 2902, Vernon's Texas Civil Statutes	2, 3
Article 2922-11, Vernon's Texas Civil Statutes	3, 4
Article 7041, Vernon's Texas Civil Statutes	3
Special Act of 1925 Creating the Fort Worth Independent School District (Local and Special Laws of Texas of 1925, p. 674, ch. 230)	3, 4, 5

TABLE OF CONTENTS FOR APPENDICES

Page

APPENDIX A—Constitutional Provisions and Statutes Involved 1a

U. S. Constitution, Article 1, Section 8, Clause 1 ..., 1a

U. S. Constitution, Amendment 10 ..... 1a

Texas Constitution, Article 7, Section 1 ..... 1a

Texas Constitution, Article 7, Section 3 ..... 1a

Vernon's Texas Civil Statutes, Article 2784e, Paragraphs 1, 3, and 4 ..... 3a

Vernon's Texas Civil Statutes, Article 2784e-1, Section 1 and Paragraph 3 ..... 4a

Vernon's Texas Civil Statutes, Article 2799 ..... 4a

Vernon's Texas Civil Statutes, Article 2827, Paragraphs 1 and 2 ..... 5a

Vernon's Texas Civil Statutes, Article 2902 ..... 6a

Vernon's Texas Civil Statutes, Article 2922-11 ..... 7a

Vernon's Texas Civil Statutes, Article 7041 ..... 7a

Special Act of 1925 Creating The Fort Worth Independent School District 7a

APPENDIX B—Statement of Eugene Hightower, Business Manager, Fort Worth Independent School District 11a

A. Organization 11a

B. Revenues 12a

C. Wages and Hours 13a

D. Employees Affected 13a

E. Job Description 15a

F. Budget and Expenditures 15a

IN THE

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STATE OF MARYLAND, ET AL., *Appellants*

vs.

W. WILLARD WIRTZ, SECRETARY OF LABOR ET AL., *Appellees*

On Appeal From the United States District Court for the District of Maryland

Brief on Behalf of The Fort Worth Independent School District

TO SAID HONORABLE COURT:

The rules of this Court for perfecting an appeal from a decision of a Three Judge Federal Court have been complied with by the Attorney Generals of Maryland and Texas, who represent all Appellants in this case.

Upon Motion and Order the Trial Court allowed the Fort Worth Independent School District of Fort Worth, Texas, to join Appellants as an Intervenor in this case. It is the only school district that is a party to this suit; although, all other school districts in the United States are affected by the provisions of the 1966 Amendment to the Fair Labor Standards Act. Thus, Fort Worth is representative of all other school

districts in the United States. We shall limit this Brief to an objective analysis:

(1) of the Texas Statutes which govern Texas schools, and

(2) of the application of the 1966 Act as applied to the Fort Worth public free schools.

Briefs have been filed by the Attorney Generals of Maryland and Texas on behalf of all Appellants, including the Fort Worth Independent School District, wherein there will be found a complete list of all of the authorities on all of the questions presented by this appeal. We shall not burden the Court with a repetition of citation of the same authorities.

ESTABLISHMENT OF PUBLIC FREE SCHOOLS

The Constitution of Texas enjoined the Legislature to establish and maintain an efficient system of public free schools, Article 7, Section 1 (App.A., p.1a).

The Constitution of Texas provides for the sources of revenue to finance the public free schools, Article 7, Section 3 (App.A, pp.1a and 2a).

The Legislature authorizes the local school districts to levy, assess and collect taxes to finance the local schools, Articles 2784e and 2784e-1, and Article 2799, V.A.C.S. (App.A, pp.3a, 4a and 5a).

The Legislature limits the purposes for which the public free school funds may be expended, Article 2827, V.A.C.S. (App.A, pp.5a and 6a).

Article 2902, V.A.C.S. (App.A, p.6a) provides in

part:

> "* * * The board of school trustees * * * shall admit to the benefits of the public schools any person over six and not over twenty-one years old at the beginning of the scholastic year, * * *"

Article 2922-11, V.A.C.S. (App.A, p.7a) provides:

> "This Act shall be known as the Foundation School Program Act. It is the purpose of this Act to guarantee to each child of school age in Texas the availability of a minimum Foundation School Program for nine (9) full months of the year, and to establish the eligibility requirements applicable to Texas public school districts in connection therewith."

STATE TAX

The method of providing for the levying and collecting of the State ad valorem tax for public free school purposes is set forth in Article 7041, V.A.C.S. (App.A, p.7a).

LOCAL TAX

The Act Creating the Fort Worth Independent School District (Local and Special Laws of Texas of 1925, p. 674, ch. 230; App.A, pp.7a, 8a, 9a and 10a) authorizes the board of trustees to invoke the provisions of the State law for the purpose of assessing and collecting school taxes for the school district.

In Appendix A, pp. 1a, 2a, 3a, 4a and 5a we have set forth in detail both the constitutional and statutory provisions relating to the methods of imposing taxes

for the support of the public free schools. The local school district can only levy, assess and collect a tax on the ad valorem property located in the district after an election has been held for a specific purpose.

NINE SCHOLASTIC MONTHS EACH YEAR

Section 12 of the Act Creating the Fort Worth Independent School District (App.A, p.8a) provides in part:

> "* * * The board shall establish, manage and control all public free schools within said district, and shall provide for maintaining and operating same for at least nine (9) scholastic months in each year, * * *"

This is the same as the State law requirement, Article 2922-11, V.A.C.S. (App.A, p.7a) paragraph (2) below.

STATUTORY REQUIREMENTS

(1) The benefits of the public free schools shall be available to any person over six and not over twenty-one years of age, Article 2902, V.A.C.S. (App.A, p.6a).

(2) The Foundation School Program Act, Article 2922-11, V.A.C.S. (App.A, p.7a) provides that every school must operate for nine full months of each year. The requirements of this law have in fact been carried into execution by the Texas Education Agency.

(3) The Legislature has by law required Fort Worth to maintain and operate the public free schools within said district for at least nine (9) scholastic

months in each year, Section 12, Special Act of 1925 Creating the Fort Worth Independent School District (Local and Special Laws of Texas of 1925, p. 674, ch. 230; App.A, p.8a).

(4) The State of Texas levies and collects taxes for the payment of a part of the cost of operating the public free schools in the State, Texas Constitution, Article 7, Section 1, (App.A, p.1a).

(5) Each local school district imposes an ad valorem tax for the maintenance and operation of the local schools, Articles 2784e and 2784e-1 and Article 2799, V.A.C.S. (App.A, pp.3a, 4a and 5a).

The continued existence and operation of the local school district is dependent upon compliance with the constitutional and statutory requirements of the State. As pointed out in the above statute the local district cannot impose a tax greater than $1.50 on the $100.00 valuation. Out of 1303 school districts in this State probably one-half of them, or more, have already reached this limit. They cannot, under the statutes of Texas, impose additional tax to carry out the congressional mandates of the Act nor for any other purpose. We submit that this is a serious matter and is not a subject to be lightly disregarded as was done by the majority of the Three Judge Court.

AN ANALYSIS OF THE STATEMENT OF EUGENE HIGHTOWER, BUSINESS MANAGER, FORT WORTH INDEPENDENT SCHOOL DISTRICT

Appendix B is an accurate reproduction of the Statement of Mr. Eugene Hightower, the Business

Manager of the Fort Worth Independent School District, which Statement was included in the Stipulation of counsel in the Trial Court. We shall briefly analyze this Statement.

On pp. 11a and 12a, Paragraph A of Appendix B entitled "Organization" Mr. Hightower points out that the trustees are charged with the responsibility of assessing, levying and collecting ad valorem taxes on the property owners in the district, together with other information concerning the number of students, the number of teachers and the number of other employees.

On pp. 12a and 13a, Paragraph B of Appendix B, entitled "Revenues" Mr. Hightower points out a most significant fact and we quote therefrom as follows:

> "The revenues for operating the School District are limited to the following sources:
>
> (1) The State and county available funds, approximately 49% - 50%
>
> (2) Local school funds from district taxes, approximately 46% - 49%
>
> (3) Grants from the Federal Government, approximately 1% - 4%.
>
> The Federal Grants are by operation of grace and subject to being withdrawn or withheld at the pleasure of the Federal Government. The State derives its revenues from taxes. The local district derives its revenues from an ad valorem tax on the property owners within the district. The Texas Law, Article 2827, V.A.C.S., limits the purpose for which tax funds may be expended. In order for the District to comply with the re-

quirements of the Fair Labor Standards Amendment of 1966 the District will be required to assess, levy and collect additional ad valorem taxes on the property owners owning property within the District. The Federal Government is thus imposing indirectly a tax on the property owners in the District.

* * *"

On p.13a, Paragraph C of Appendix B, entitled "Wages and Hours" Mr. Hightower has computed the additional cost as required by the provisions of the 1966 Amendment to the Fair Labor Standards Act, namely:

"No employee of the District is paid less than $1.00 per hour. A computation of the additional cost to the District as exacted by the terms of the Act relating to overtime is set forth as follows:

February 1, 1967-February 1, 1968	$186,866.80
February 1, 1968-February 1, 1969	318,608.40
February 1, 1969-February 1, 1970	450,350.00
February 1, 1970-February 1, 1971	512,750.00
February 1, 1971-	575,150.00

* * *

There is no other source from which the above additional cost of operation can be obtained other than the assessing, levying and increase of the ad valorem tax on the property owners within the District."

On pp. 13a and 14a, Paragraph D of Appendix B entitled "Employees Affected" Mr. Hightower points out that 1490 employees will be affected by the Act, all of whom are now under contract and are perma-

nently employed. He points out in great detail the benefits that the contractual employees receive and that if the Act goes into effect this status will be changed, and they will become hourly employees.

We pause to observe that the local board of trustees, the administrative staff and the employees affected, over a period of years, have established a system that has proven to be advantageous and satisfactory both to the schools and to the employees. This group does not share the apparent philosophy of the Congress that the employees should be changed from their present status to hourly workers. We are prepared to believe that the local boards of education of all the school districts in the country and the local employees affected by the Wage and Hour Act feel that the Congress should not substitute its judgment for that of the local boards and the employees. To do so would in effect make the Congress the school board for the country. That authority has not been given to the Congress by the U. S. Constitution.

On Page 15a of Appendix B, Paragraph E entitled "Job Description" Mr. Hightower sets forth in great detail the summary of the job descriptions of the employees affected by the Act in which he pointed out that the employees individually and collectively are engaged in activities that are local in nature and that no goods or merchandise is made, manufactured, sold, transferred or placed in commerce.

An interesting part of Mr. Hightower's Statement is found on pp. 15a and 16a, Paragraph F entitled

"Budget and Expenditures" in which he points out that an audit shows that 98.9744 per cent of the budget was spent in Intrastate Commerce and that 01.0256 per cent was spent in Interstate Commerce.

PERPLEXING PROBLEM

The Texas Law and the Statement of Mr. Hightower leave in no doubt that the only three sources of revenue to pay the costs of operating a local school system are from (1) the State (2) the local district, and (3) grants from the Federal Government. The local district has no control over items (1) nor (3). The local district can and does depend upon the State for approximately one-half of the total cost of operating the system. The amount of the grants from the Federal Government vary from 1 per cent to 4 per cent depending upon the pleasure of the Congress and the directives of the federal administrator. The local district has no assurance that it will receive any sum whatever from this source. We repeat this is a matter of grace. Therefore, the only source of additional revenue to defray the added cost as required by the Act would be for the local district to comply with the State law and the Law creating the district, namely: (a) to call an election for the purpose of levying, assessing and collecting additional ad valorem taxes on the owners of real property in the district, (b) that the eligible voters in the district by a majority vote must approve such additional tax. We are not prepared to suggest the consequences that would result if a majority of the voters should register their vote in the negative. For emphasis we repeat, there is no

other way for the Fort Worth Independent School District to raise the money to comply with the requirements of the Act. It is no answer to say, as was done by the Three Judge Court, that the school district would have to make its own arrangements. There are no other arrangements to be made. Furthermore, the maximum rate for all school districts in the State is fixed by Articles 2784e and 2784e-1, V.A.C.S. (App.A, pp. 3a and 4a). Most of the schools in this State have already voted the maximum rate. Thus, no additional tax can be voted. Furthermore, the State law requires that the schools must be operated for at least nine scholastic months each year and this means a minimum of 180 school days. Thus, it is no answer, as was suggested in the Opinion of Circuit Judge Winter, that the term of the schools could be for a lesser period of days. We respectfully urge that the Congress and the Federal Courts are without authority to substitute their notions of policy for that of the Legislature of the State and the local school authorities, and that is exactly what the Congress and Circuit Judge Winter are attempting to do.

TENTH AMENDMENT

The Law Creating the Fort Worth Independent School District makes it an agency and instrumentality of the State. Thus, it is our position that the Tenth Amendment applies.

INTERSTATE COMMERCE

The Briefs by the Attorney Generals of Maryland and Texas on behalf of all the Appellants in this case,

discuss at length the reasons why the schools are not engaged in Interstate Commerce. This contention finds support in the Statement of Mr. Hightower that 98.9744 per cent of all merchandise bought in Fort Worth is Intrastate and 01.0256 per cent is Interstate (App.B, p.16a).

The public free schools are operated for the sole purpose of educating children. The compensation paid to the superintendent, the teacher, the janitor or any other employee is only a means to accomplish such purpose.

CONTROLLING POINT

Thus, we reach the controlling and ultimate point for decision by this Court so far as local school districts are concerned, namely: does the Congress have authority under the Constitution of the United States to levy, assess and collect a tax on the Fort Worth Independent School District? If the Congress should attempt to impose a direct tax on the local school district, we ask wherein would it find its authority and what method would be employed by the Congress to levy, assess and collect such tax? The answer to this question we feel is elementary and fundamental and certainly the Congress does not have any such authority to impose a direct tax. It follows that if the Congress does not have authority to impose a tax directly, it cannot impose the same tax indirectly. We submit that the Congress does not have authority to require a local school district to levy, assess and collect a tax to carry into execution the requirements that the

Congress did not have authority to make in the first place. We find no such authority in Article 1, Section 8, Clause 1 of the U.S. Constitution, (App.A, p.1a).

The Congress is without authority to establish itself as the school board for the country. This Court should so hold.

CONCLUSION

Since the Congress is without authority under the U.S. Constitution to impose a direct tax on a local school district it, likewise, is without authority to impose such a tax indirectly. Thus, we call on this Court to hold unconstitutional the 1966 Amendment to the Fair Labor Standards Act.

Respectfully Submitted,

Cecil A. Morgan
Counsel for the Fort Worth Independent School District
2108 Continental Life Building
Fort Worth, Texas 76102

CERTIFICATE

A copy of this Brief has been mailed to the following: (1) Honorable Francis B. Burch, Attorney General of Maryland (2) Honorable Crawford C. Martin, Attorney General of Texas, (3) Erwin S. Griswold, Esquire, Solicitor General, on this 26th day of February, 1968.

Cecil A. Morgan

APPENDIX A

Constitutional Provisions and Statutes Involved
U. S. Constitution, Article 1, Section 8, Clause 1

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

U. S. Constitution, Amendment 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Texas Constitution, Article 7, Section 1

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

Texas Constitution, Article 7, Section 3

One-fourth of the revenue derived from the State occupation taxes and poll tax of one dollar on every inhabitant of the State, between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools; and in addition thereto, there shall be levied and collected an annual ad valorem State tax of such an amount not to exceed

thirty-five cents on the one hundred ($100.00) dollars valuation, as with the available school fund arising from all other sources, will be sufficient to maintain and support the public schools of this State for a period of not less than six months in each year, and it shall be the duty of the State Board of Education to set aside a sufficient amount out of the said tax to provide free text books for the use of children attending the public free schools of this State; provided, however, that should the limit of taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the State and the Legislature may also provide for the formation of school district by general laws; and all such school districts may embrace parts of two or more counties, and the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public schools or schools of such districts, whether such districts are composed of territory wholly within a county or in parts of two or more counties, and the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts heretofore formed or hereafter formed, for the further maintenance of public free schools, and for the erection and equipment of school buildings therein; provided that a majority of the qualified property taxpaying voters of the district voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year one ($1.00) dollar on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of school district tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts, nor to independent or common school districts created by general or special law. As amended Aug. 14, 1883, proclama-

tion Sept. 25, 1883; Nov. 6, 1908, proclamation Feb. 2, 1909; Aug. 3, 1909, proclamation Sept. 24, 1909; Nov. 5, 1918; Nov. 2, 1920; Nov. 2, 1926, proclamation Jan. 20, 1927.

Vernon's Texas Civil Statutes, Article 2784e
Paragraphs 1, 3, and 4

Taxing Power. The Commissioners Court for the common school districts in its county, and the district school trustees for the independent school districts incorporated for school purposes only, and trustees of rural high school districts and the trustees of all other school districts shall have power to levy and cause to be collected the annual taxes and to issue the bonds herein authorized, subject to the following provisions:

1. In common school districts, for the further maintenance of public free schools and the erection and equipment of school buildings therein, a special tax; and in independent districts, rural high school districts and all other school districts for the maintenance of schools therein, an ad valorem tax not to exceed One Dollar and Fifty Cents ($1.50) on the One Hundred ($100.00) Dollars valuation of taxable property of the district.

* * *

3. The amount of maintenance tax, together with the amount of bond tax of any district, shall never exceed One Dollar and Fifty Cents ($1.50) on the One Hundred ($100.00) Dollars valuation of taxable property; and if the rate of bond tax, together with the rate of maintenance tax voted in the district shall at any time exceed One Dollar and Fifty Cents ($1.50) on the One Hundred ($100.00) Dollars valuation, such bond tax shall operate to reduce the maintenance tax to the difference between the rate of the bond tax and One Dollar and Fifty Cents ($1.50).

4. No tax shall be levied, collected, abrogated, diminished or increased, and no bonds shall be issued hereunder until such action has been authorized by a majority of the votes cast at an election held in the district for such purposes, at which none but property taxpaying qualified voters of such district shall be entitled to vote.

* * *

Acts 1945, 49th Leg., p. 488, ch. 304, § 1; Acts 1947, 50th Leg., p. 534, ch. 314, § 1.

Vernon's Texas Civil Statutes, Article 2784e-1, Section 1 and Paragraph 3

Section 1. The Commissioners Court for the common school districts in its county, and trustees of rural high school districts, and trustees of all other school districts, shall have the power to levy and cause to be collected the annual taxes and to issue the bond herein authorized, subject to the following provisions:

* * *

3. No tax shall be levied, collected, abrogated, diminished, or increased, and no bond shall be issued hereunder until such action has been authorized by a majority of the votes cast at an election held in the district for such purposes, at which none but property taxpaying qualified voters of such district, whose property has been duly rendered for taxation, shall be entitled to vote.

* * *

Acts 1955, 54th Leg., p. 1635, ch. 528; Acts 1957, 55th Leg., p. 167, ch. 74, § 1.

Vernon's Texas Civil Statutes, Article 2799

The governing body of any city or town which is a separate and independent school district, whether in-

corporated under any act of the Congress of the Republic or the Legislature of Texas, or under any act or incorporation whatever, shall have power by ordinance to annually levy and collect ad valorem taxes for the support and maintenance of public free schools and for the erection and equipment of public free school buildings in the city or town. The proposition submitted may be for such a rate of ad valorem tax not exceeding such per cent. as may be voted by a majority vote of all votes cast in any such election. If the proposition is carried, the school tax shall be continued to be annually levied and collected for at least two years, and thereafter, unless it be discontinued at an election held to determine whether the tax shall be continued or discontinued at the request of fifty property taxpayers of such independent district. When the tax is continued no election to discontinue it shall be held for two years; when the tax is discontinued no election to levy a tax shall be held during the same year. Acts 1905, p. 263; Acts 1917, p. 380.

Vernon's Texas Civil Statutes, Article 2827, Paragraphs 1 and 2

The public free school funds shall not be expended except for the following purposes:

1. The State and county available funds shall be used exclusively for the payment of teachers' and superintendents' salaries, fees for taking the scholastic census, and interest on money borrowed on short time to pay salaries of teachers and superintendents, when these salaries become due before the school funds for the current year become available; provided that no loans for the purpose of payment of teachers shall be paid out of funds other than those for the then current year.

2. Local school funds from district taxes, tuition fees of pupils not entitled to free tuition and other local sources may be used for the purposes enumerated for State and county funds and for purchasing appliances and supplies, for the payment of insurance premiums, janitors and other employes, for buying school sites, buying, building and repairing and renting school houses, and for other purposes necessary in the conduct of the public schools to be determined by the Board of Trustees, the accounts and vouchers for county districts to be approved by the county superintendent; provided, that when the State available school fund in any city or district is sufficient to maintain the schools thereof in any year for at least eight months, and leave a surplus, such surplus may be expended for the purposes mentioned herein.

* * *

Acts 1905, p. 263; Acts 1919, p. 189; Acts 1934, 43rd Leg., 4th C.S., p. 34, ch. 9, § 1.

Vernon's Texas Civil Statutes, Article 2902

All children, without regard to color, over six years of age and under eighteen years of age at the beginning of any scholastic year, shall be included in the scholastic census and shall be entitled to the benefit of the public school fund for that year. The board of school trustees of any city or town or independent or common school district shall admit to the benefits of the public schools any person over six and not over twenty-one years old at the beginning of the scholastic year, if such person or his parents or legal guardian reside within said city, town or district. Acts 1905, p. 263; Acts 1913, p. 175; Acts 1915, p. 183; Acts 1929, 41st Leg., p. 232, ch. 97.

Vernon's Texas Civil Statutes, Article 2922-11

This Act shall be known as the Foundation School Program Act. It is the purpose of this Act to guarantee to each child of school age in Texas the availability of a minimum Foundation School Program for nine (9) full months of the year, and to establish the eligibility requirements applicable to Texas public school districts in connection therewith. Acts 1949, 51st Leg., p. 625, ch. 334, art. 1, § 1.

Vernon's Texas Civil Statutes, Article 7041

The Governor, Comptroller and State Treasurer are constituted a board to calculate the ad valorem tax to be levied and collected each year for State and public free school purposes. Acts 1907, p. 464.

Special Act of 1925 Creating the Fort Worth Independent School District

(Local and Special Laws of Texas of 1925, page 674, chapter 230)

Section 1. Created the Fort Worth Independent School District and severed the connection theretofore existing between the public school system and the municipal corporation known as the City of Fort Worth. However, provision was made in subsequent parts of this Special Act for the assessment and collection of school taxes by the Tax Assessor and Collector of the City of Fort Worth.

* * *

Section 6. From and after the passage of this Act, the Fort Worth Independent School District shall be under the management and control of seven trustees, to be collectively known as the board of education of the Fort Worth Independent School District. The

members of said board of education, now known as the board of trustees of the independent school district of Fort Worth, as at present constituted, shall, however, continue in office, execute and perform the duties and powers herein conferred upon the board of education until the enacting and taking effect of this Act, and until their successors as herein provided for shall have been selected and qualified, as hereinafter provided.

Section 7. The members of said board of education shall be elected at large in said district by the qualified voters thereof, and which said board shall collectively be known and designated as the board of education of the Fort Worth Independent School District, said trustees, in order to be eligible to office must have been freeholders in said district for at least one year, and qualified voters of said district for a period of three years, and in addition thereto, shall be persons of good moral character, and possessed of at least a grammar school education.

* * *

Section 12. (a) The members of said board shall serve without compensation. The board shall establish, manage and control all public free schools within said district, and shall provide for maintaining and operating same for at least nine (9) scholastic months in each year, and shall have the management and control of all properties of said corporation, and shall in all matters act for said corporation. Said board shall have power to purchase or lease suitable grounds upon which to erect school buildings and play grounds necessary for said schools, and to construct and equip said school buildings and play grounds within said district; and shall provide for the maintaining and keeping in repair of school buildings, appurtenances, furniture apparatus and appendages used for public school purposes within said district, and for keeping

said buildings, grounds, and their property, in good order and in good sanitary condition. The board may establish schools within said district for the teaching and instruction of pupils in special subjects, as it from time to time may consider advisable.

(b) The board shall have the power to prescribe the qualifications to be required of teachers that may be employed in such schools, and to issue certificates to such teachers, and to fix a schedule of salaries for all teachers employed by said board; provided the qualifications required shall never be under those required by General Law.

(c) The board shall have the exclusive authority to recognize and validate teachers' certificates and diplomas issued by other schools, towns, cities or states; provided no certificates or diplomas shall be recognized or validated unless up to the standard required by General Law.

(d) Said board shall appoint and employ a superintendent of schools. Said appointment to be made at the first regular meeting in March, or as soon thereafter as practicable, and such employment may be for a period of two years or longer as provided by General Law, and in the event of a vacancy in said office, the board shall appoint a successor thereto at the earliest convenient opportunity.

(e) It shall be the duty of the superintendent of schools annually, before the first day of July of each year, to prepare a comprehensive plan of the organization of the school system for the ensuing school year, and submit the same to the board for approval.

* * *

(l) For the purpose of carrying out the powers and authority herein conferred upon said board, ex-

press power is hereby conferred upon the board of education to levy and collect taxes upon all property taxable within said district, and this power to levy and collect taxes is subject to the limitation herein set forth.

(o) The board of education shall have the power to enforce the attendance at such schools of any and all children who reside within said Fort Worth Independent School District, within the scholastic age, now or hereafter approved by General Law, * * *.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 18,005

STATE OF MARYLAND, ET AL, Plaintiffs

vs.

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL, Defendants

STATEMENT OF EUGENE HIGHTOWER, BUSINESS MANAGER, FORT WORTH INDEPENDENT SCHOOL DISTRICT

The Fort Worth Independent School District, Fort Worth, Texas. Eugene Hightower, Business Manager for the Fort Worth Independent School District, if placed under oath would testify as follows concerning the operation of the District:

A. *Organization.* The organization of the Fort Worth Independent School District is similar to that of the other 1303 districts in the State, namely, it is governed by a local board of trustees elected by the people living within the district. The board is charged with the responsibility of:

(1) fixing policies

(2) selecting all employees

(3) assessing, levying and collecting ad valorem taxes on the property owners in the district

(4) providing an educational system free of cost for all children between the ages of 6 and 18 who reside in the district.

The Fort Worth District has:

(1) 80,000 students enrolled

(2) 3569 on the administrative and teaching staff

(3) 1490 additional employees

B. *Revenues.* The revenues for operating the School District are limited to the following sources:

(1) The State and county available funds, approximately 49% - 50%

(2) Local school funds from district taxes, approximately 46% - 49%

(3) Grants from the Federal Government, approximately 1% - 4%.

The Federal Grants are by operation of grace and subject to being withdrawn or withheld at the pleasure of the Federal Government. The State derives its revenues from taxes. The local district derives its revenues from an ad valorem tax on the property owners within the district. The Texas Law, Article 2827, V.A.C.S., limits the purpose for which tax funds may be expended.

In order for the District to comply with the requirements of the Fair Labor Standards Amendment of 1966 the District will be required to assess, levy and collect additional ad valorem taxes on the property owners owning property within the District. The Federal Government is thus imposing indirectly a tax on the property owners in the District.

At the present time there are 7 governmental agencies which impose an ad valorem tax on the property owners who own property in the Fort Worth Independent School District. The name of each agency and the tax rate per $100.00 taxable valuation is set forth

as follows, to-wit:

Junior College	$ .27
Water Improvement District	.24
Hospital District	.52
County	.82
State	.71
City	1.73
School District	1.59

C. *Wages and Hours.* No employee of the District is paid less than $1.00 per hour. A computation of the additional cost to the District as exacted by the terms of the Act relating to overtime is set forth as follows:

February 1, 1967-February 1, 1968	$186,866.80
February 1, 1968-February 1, 1969	318,608.40
February 1, 1969-February 1, 1970	450,350.00
February 1, 1970-February 1, 1971	512,750.00
February 1, 1971-	575,150.00

There is no other source from which the above additional cost of operation can be obtained other than the assessing, levying and increase of the ad valorem tax on the property owners within the District.

D. *Employees Affected.* The Act includes all non-teaching personnel. In the Fort Worth District this classification includes 1490 employees, most of whom have been with the District for many years, all of whom are under contract and both the employee and the District consider that the employee is permanently employed and that he or she is engaged in this work as a career or a profession. As such, each of said employees have in addition to their regular annual

salary the following benefits:

Career Employees by Catagories and Benefits:

Employees	*Catagories*
282	clerical*
360	custodians
197	maids
89	maintenance
562	cafeteria
1490 . . . Total	

Career people are employed under a yearly contract, on a guaranteed salary, with the following benefits.

1. Retirement**—state plan for auxiliary employees
2. Terminal pay
3. Vacation—two weeks***
4. Holidays—approximately 15 days per year
5. Sick leave—10 days per year at full pay, 10 days at half pay, cumulative to 80 days
6. Death in family—one to five days off
7. Personal Business—two days per year, less substitute pay
8. Life Insurance—$1,000.00 paid by district
9. Life Insurance—low group rate paid by employee
10. Insurance — income protection — group plan paid by employee
11. Hospitalization Insurance — low group rate paid by employee

*Work week for clerical employees is reduced from 8 hours to 7 hours during June, July, August

**Retirement for clerical workers based on teacher retirement schedule

***Head custodians and maintenance employees receive an extra week vacation in lieu of extra pay for overtime work.

The change from the present system to a compliance with the requirements of the Act would destroy or at least materially modify the existing contractual relationship between the District and its employees. The employee's status would be reduced from a profession to a wage earner.

E. *Job Description.* A job description of the work required and performed by each and every employee, non-teaching personnel, has been compiled, marked Exhibit 5, attached to and made a part of this Statement. A summary of job descriptions, salary schedules and hours of normal work weeks on non-teaching personnel has been set forth in Exhibit 6, attached hereto and made a part hereof.

Based upon the factual data set forth in Exhibits 5 and 6, an analysis reveals:

(1) These Exhibits set forth accurately, objectively and in detail the work that is required and the work that is performed by every employee in the District in the non-teaching personnel.

(2) The job requirements of each employee are limited to the operation of the local school.

(3) All services rendered by every employee are limited to the activities within the District.

(4) The employees, individually and collectively, are engaged in activities that are local in nature.

(5) No goods nor merchandise is made, manufactured or in any manner sold, transferred or placed in commerce. To illustrate, the engineer heats and cools the building. The maid keeps the building clean.

F. *Budget and Expenditures.* The annual operating budget for the school year 1965-66 was $34,317,752.78. An audit has been made of each and every purchase

for merchandise or supplies of every kind and character as set forth in Exhibit 7, attached to and made a part hereof. This audit accurately reveals every expenditure made in every transaction of both Intrastate and Interstate. It further reveals every expenditure for services rendered and supplies purchased. In the event of doubt concerning any item, it was classified as Interstate as shown by Exhibit 7a, attached hereto and made a part hereof. The following items were classified as Interstate transactions:

(1) All supplies and materials that were purchased direct from an out of State supplier.

(2) All supplies and materials which were paid for by a check sent out of State although the negotiations for the supplies were made by a local merchant in Fort Worth.

This audit shows that 98.9744 per cent of the budget was spent Intrastate, that is, for services rendered or materials supplied in Fort Worth. The remaining 01.0256 per cent of the budget was spent for materials supplied from merchants outside of the State of Texas.

The District uses or consumes all supplies and materials purchased.

I certify that the above Statement is true and correct to the best of my knowledge.

EXECUTED at Fort Worth, Texas, this 16th day of February, A. D. 1967.

/s/ Eugene Hightower, Business Manager, Fort Worth Independent School District.

SUPREME COURT, U. S.

FEB 28 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

NO. 742

STATE OF MARYLAND, ET AL.,
Appellants,

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, ET AL.
Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF FOR APPELLANT STATE OF TEXAS

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INDEX

Introduction 1

Question Presented 2

Summary of Argument 2

Argument 3

I. The Reach of the Commerce Power 5

II. The Special Position of States 17

Conclusion 21

TABLE OF CITATIONS

Cases

Brown v. Board of Education, 347 U.S. 483 (1954) 18

Burnet v. Harmel, 287 U.S. 103 (1932) 21

California v. Taylor, 353 U.S. 553 (1957) 18

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Carter v. Carter Coal Co., 298 U.S. 238 (1936) 3

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 9

Flint v. Stone Tracy Co., 220 U.S. 107 (1910) 21

Gibbons v. Ogden, 9 Wheat. 1 (1924) 3, 5, 6, 18, 20

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 8

Hylton v. United States, 3 Dall. 171 (1796) 21

Katzenbach v. McClung, 379 U.S. 294 (1964) 9, 11

Kirschbaum v. Walling, 316 U.S. 517 (1942) 4

License Tax Cases, 5 Wall. 462 (1866) 21

Loan Assn. v. Topeka, 20 Wall. 655 (1874) 21

McCray v. United States, 195 U.S. 27 (1904) 21

McCulloch v. Maryland, 4 Wheat. 316 (1819) 3

Martin v. Hunter's Lessee, 1 Wheat. 304 (1816) 1

Massachusetts v. Mellon, 262 U.S. 447 (1923) 15

N.L.R.B. v. Jones & Laughlin Steel Co., 301 U.S. 1 (1937) 6

CITATIONS — Continued

New York v. United States, 326 U.S. 572 (1946) 19, 20
Pacific Ins. Co. v. Soule, 7 Wall. 433 (1868) 21
Panhandle Oil Co. v. Mississippi, 277 U.S. 218 (1928) 10
Parden v. Terminal Ry Co., 377 U.S. 184 (1964) 18
Santa Cruz Fruit Packing Co. v. N.L.R.B., 303 U.S. 453 (1938) 7
Tanner v. Little, 240 U.S. 369 (1916) 21
United States v. California, 297 U.S. 175 (1936) 18
United States v. Darby, 312 U.S. 100 (1941) 7
United States v. E. C. Knight Co., 156 U.S. 1 (1895) 3
United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) 7
Wickard v. Filburn, 317 U.S. 111 (1942) 7, 15

Statutes

U. S. Const., Art. I, § 8 ..... 5, 20
20 U.S.C. § 753 15
23 U.S.C. § 113 15
29 U.S.C. § 203(i) 11
29 U.S.C. § 203(r) 11
29 U.S.C. § 203(s) 11
42 U.S.C. § 291e(a)(5) 15
42 U.S.C. § 2947 15
Pub. L. 89-601, § 102 4

Miscellaneous

Amendments to the Fair Labor Standards Act, Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 89th Cong., 1st and 2d Sess. (1965-66) 13, 17
Crosskey, Politics and the Constitution in the History of the United States (1953) 5
Frankfurter, The Commerce Clause (Mendelson ed. 1964) 9
H. Rep. No. 1366, 89th Cong., 2d Sess. (1966) 13
S. Rep. No. 1487, 89th Cong., 2d Sess. (1966) 13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

NO. 742

STATE OF MARYLAND, ET AL.,
Appellants,

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, ET AL.
Appellees.

On Appeal from the United States District Court
for the District of Maryland

BRIEF FOR APPELLANT STATE OF TEXAS

INTRODUCTION

"Few minds are accustomed to the same habit of thinking, and our conclusions are most satisfactory to ourselves when arrived at in our own way." *Martin v. Hunter's Lessee,* 1 Wheat. 304, 362 (1816) (Johnson, J. concurring).

The State of Texas does not disagree with the presentation of the appellant's position in the brief submitted on behalf of Maryland and the other appellants. There are however differences of emphasis and approach, and we believe we can be most helpful to the Court by this separate statement of our views. In order to avoid unduly burdening the Court, we do not duplicate the Statement of the Case nor the detailed analysis of the authorities made in the brief presented by Maryland and the other appellants, with all of which we fully agree.

QUESTION PRESENTED

Is the impact on interstate commerce of the wages and hours of employees of state schools and hospitals sufficiently substantial to permit Congress to regulate these wages and hours despite the damage thus done to the finances and sovereignty of the states?

SUMMARY OF ARGUMENT

1. Though the commerce power of Congress is very broad, this Court has always recognized that it is limited to "that commerce which concerns more states than one," and has held that local activities can be regulated only if the facts permit a rational conclusion that the local activity has a substantial and harmful effect on commerce among the several states. Undoubtedly the purchases in interstate commerce by state schools and hospitals have a close and intimate relation to such commerce, but the wages and hours of the employees of these state institutions have no impact, substantial or otherwise, on interstate commerce, and there are no facts in the legislative history or elsewhere that would justify a conclusion that they have such an impact.

2. To apply these wage and hour regulations to the state would have a devastating impact on the ability of the states to provide essential services and on their sovereign power to govern themselves. Even if some marginal relation to interstate commerce could be found, it should not be found where it would do violence to the presuppositions derived from the fact that we are a nation composed of states.

ARGUMENT

> This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required it to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. *McCulloch v. Maryland,* 4 Wheat. 316, 405 (1819).

The present case presents a question of just the sort foreseen by Chief Justice Marshall. How far does the commerce power of Congress extend, particularly when measured against the power of the states to govern themselves? This Court has had frequent occasion to address itself to aspects of this question, but it is unlikely, so long as it is a Constitution the Court is expounding, that it will ever be able to formulate a rule that will provide automatic answers to every case that may arise.

It is familiar history that from 1895 to 1936, in the line of cases extending from *United States v. E. C. Knight Co.,* 156 U.S. 1 (1895) to *Carter v. Carter Coal Co.,* 298 U.S. 238 (1936), this Court—with only an occasional happy exception—took a very narrow view of the reach of the congressional power over commerce. We disclaim any reliance whatever on those cases. We accept fully the broad reading of the Commerce Clause put forward in *Gibbons v. Ogden,* 9 Wheat. 1 (1824), and in the cases since 1937 in which the Court has built on Marshall's vision. We believe that those cases teach

that the commerce power, though very broad, is not unlimited. We further believe that in § 102 of Public Law 89-601 Congress has gone beyond that limit.

The position of the United States, successfully advanced in the court below, is essentially the following:

(1) The power of Congress over commerce is very broad;

(2) The power where it exists is plenary;

(3) State instrumentalities are subject to regulation by Congress in the proper exercise of the commerce power;

Therefore, the statute here challenged is valid.

Texas has no quarrel with any of the premises stated. Each of them has impressive support in authoritative decisions of this Court. The difficulty, rather, is with the conclusion drawn from such premises. The conclusion follows only if it is demonstrated that the regulation here attempted is within the broad power over Congress. That, as we shall argue more fully, is a demonstration not yet made and that we think cannot be successfully made. We contend further that the extent of the commerce power and the fact that it is states that are to be regulated cannot profitably be viewed in isolation. In resolving a doubtful question of the reach of the commerce power, the fact that it is states that are to be regulated is itself a powerful reason to resolve the doubt against the validity of the regulation. "Federal legislation of this character cannot therefore be construed without regard to the implications of our dual government." *Kirschbaum v. Walling,* 316 U.S. 517, 520 (1942).

I. The Reach of the Commerce Power

The power of Congress in question here is the power granted in Article I, § 8, "To regulate Commerce * * * among the several States * * *." By an elaborate process of interpretation, requiring nearly 300 pages, Professor Crosskey is able to read the Commerce Clause to "include all the varieties of 'gainful activity' that Americans can carry on," and thus finds that it "means that Congress has a complete, not a fragmentary power 'to regulate Commerce.' " 1 Crosskey, *Politics and the Constitution in the History of the United States* 117 (1953). But, as he himself laments at length, *id.* at 17-49, that is not the understanding this Court has ever had of the power over commerce. It matters not how local the operation that applies the squeeze, but it must still be *interstate* commerce that feels the pinch if Congress is to have authority to act.

That there is a considerable difference between a power to regulate commerce and a power to regulate commerce "among the states" was clearly discerned by Chief Justice Marshall in *Gibbons v. Ogdens*

> It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.
>
> Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. * * * The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal

> concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

9 Wheat. 1, 194-195 (1824).

At no time since 1824 has the Court ever departed from the notion that the commerce power is a limited power, and that there are commercial activities within the United States not encompassed within its scope. Within the bounds marked by the Constitution the power "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution," *id.* at 196, but this is true only so long as the congressional action is restricted to "that commerce which concerns more states than one." The Court has repeatedly noted the existence of such a limit, and the importance of maintaining the limit.

The first of the great modern cases interpreting the Commerce Clause is *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). "The authority of the federal government," the Court there declared, "may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system." *Id.* at 30. The Court went on to pose the question as one of whether par-

ticular action "does affect commerce in such a close and intimate fashion as to be subject to federal control * * *." *Id* at 32.

Chief Justice Hughes stated a similar view, though in somewhat different terms, the following year in *Santa Cruz Fruit Packing Co. v. National Labor Relations Bord,* 303 U.S. 453, 466 (1938):

> It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still "commerce," and not all commerce but commerce with foreign nations and among the several states. The expansion of enterprise has vastly increased the interests of commerce, but the constitutional differentiation still obtains.

The constitutionality of the Fair Labor Standards Act as it then stood was the issue in *United States v. Darby,* 312 U.S. 100 (1941). The Court, in holding that Congress could validly regulate the wages and hours of those engaged in production of goods for interstate commerce, relied on the principle that the power over interstate commerce reaches "activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it." *Id* at 119-120. The test stated in *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 119 (1942), was to the same effect.

The case of *Wickard v. Filburn,* 317 U.S. 111 (1942),

has been thought to extend congressional power over interstate commerce very far. In the court below Judge Winter referred to it as "the most extreme example of the reach of the commerce power of Congress to regulate local activity * * *." 269 F.Supp. at 832. The test was put in these words in that case:

> But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

317 U.S. at 125. Justice Jackson, writing for the Court, then devoted four pages to an examination of the economics of the wheat industry in order to demonstrate that home-grown wheat competes with that moving in interstate commerce, and that consumption of home-grown wheat on many farms does have a substantial economic effect on interstate commerce. *Id,* at 125-129.

The same theme recurs in the Court's most recent expressions on this subject. In *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 258 (1964), it is said that Congress may regulate "local activities in both the States of origin and destination which might have a substantial and harmful effect upon that commerce." The record of the passage of the 1964 Civil Rights Act was examined, and found to be "replete with evidence of the burdens that discrimination by race or color places upon interstate commerce." *Id.* at 252. In the companion case of Ollie's Barbecue, the Court found "an impressive array of testimony that discrimination in restaurants had a direct and highly

restrictive effect upon interstate travel by Negroes." *Katzenbach v. McClung,* 379 U.S. 294, 300 (1964).

It can, of course, be said that each of the statements of the Court here noted is dictum. In each of the cases cited, the Court upheld the exercise of congressional power, and the result would not have been different if the power over commerce is unlimited, rather than subject to the restriction repeatedly insisted upon by the Court. But when the Court, throughout its whole history, has invariably been careful to describe the power over commerce in limited terms, it is fair to suppose that these are not mere casual expressions but that they represent a considered view that the power is so limited. "* * * [T]hough it is the fashion to insist that law is what courts do and not what they say, what they say has a considerable influence on what they do next. This is profoundly true of constitutional law. The impact of the concrete case is powerful not merely in securing a decision adapted to the needs of the immediate circumstances." Frankfurter, *The Commerce Clause* 26 (Mendelson ed. 1964).

This Court has the power to reject the limitation always recognized in the past, and to hold that the commerce power encompasses all the varieties of gainful activity that Americans can carry on. Unless the Court believes that Professor Crosskey's writing represents "the more recent research of a competent scholar, * * * which established that the construction given to it by the Court was erroneous," *Erie R. Co. v. Tompkins,* 304 U.S. 64, 72 (1938), we may fairly expect the Court to adhere to the settled construction, and to hold that the activity here involved cannot be regulated by Con-

gress unless that activity has a substantial and harmful economic effect upon interstate commerce.

It may be argued that Congress has determined that there is such a substantial and harmful economic effect by the 1966 amendments that brought these employees under the Fair Labor Standards Act. Any action of Congress comes to this Court with impressive credentials of regularity, and a strong presumption of validity. This presumption, however, cannot be conclusive. To say that congressional action in this area is unreviewable would be to preserve the form of the limitation on the commerce power while destroying its substance. Congress would then be free to regulate any activity whatever so long as it invoked the words of the commerce power in the statute. The constitutional differentiation, "essential," as Chief Justice Hughes thought, "to the maintenance of our constitutional system," between activities within the reach of Congress and those without, would then turn on the whim of Congress. In the apt phrase of one of the opinions below, this would substitute congressional federalism for constitutional federalism. 269 F.Supp. at 853 (Northrop, J., dissenting). It implies no disrespect for Congress to suggest that it may occasionally err in its judgment of the extent of its power. The whole theory of judicial review, now, for good or ill, an integral part of our governmental system, assumes that Congress may err, and that this Court has the power and responsibility to act if it should err. The commerce power, like the other great powers allocated in the Constitution, "is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

Happily the most recent expression from this Court shows that it recognizes that the congressional determination is not controlling here.

> Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

Katzenbach v. McClung, 379 U.S. 294, 303-304 (1964).

Congress has said, in § 3(r) of the Act, 29 U.S.C. § 203(r), that the activities of certain state employees "shall be deemed to be activities performed for a business purpose." In § 3(s) of the Act, 29 U.S.C. § 203(s) it has said that these state schools, hospitals, and related institutions, are "engaged in commerce or in the production of goods for commerce."* The fact that Congress has said this does not mean that it is so, and the Act can stand only if there are facts providing a rational basis for a determination by Congress that this regulation is necesary to the protection of commerce among the several states. If there is a factual basis for believing that the wage and hours of non-executive, non-professional, and non-administrative employees of public hospitals, schools, and related institutions have a substantial and harmful economic effect on interstate commerce, then Congress acted within its powers. But somewhere, either in the statute

*This is not true if the institutions for which the employees work are regarded as the "ultimate consumer" within § 3(i) of the Act, 29 U.S.C. § 203(i). The court below did not pass on that question. 269 F.Supp. at 831 n. 12.

itself or in its legislative history or in the record in this case or in facts that this Court may judicially notice, there must be a showing that these wages and hours do have such an effect.

The evil to which Congress addressed itself in 1938 in the original Act had an obvious and substantial harmful effect on commerce. If wages were lower and hours longer in State A than in State X, goods produced in State X would be at a price disadvantage in State A by comparison to the locally-produced goods; and interstate commerce would suffer. Perhaps even worse, goods produced in State A would have a price advantage in State X. These circumstances would discourage State X from adopting state wage-and-hours legislation, or from maintaining higher wage scales. Prior to the adoption of the Constitution a state could follow its own policies in these matters, and protect itself from destructive competition by less enlightened neighbors by imposing tariffs and other barriers to trade with other states. The Commerce Clause prevents the states from doing that. Thus, until Congress exercised its powers in 1938, the Commerce Clause was an instrument of destruction that could be and was used by those states in which substandard working conditions prevailed.

In the present instance, however, it is hard to see how the wages and hours of these state employees has any impact, much less a substantial and harmful impact, on interstate commerce. There are no findings in the 1966 statute describing the connection, and the skimpy legislative history of this portion of that statute is almost entirely silent.

In 1900 pages of hearings before the Senate commit-

tee, not a word can be found justifying extension of the Act to employees of state hospitals and schools. *Amendments to the Fair Labor Standards Act,* Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 89th Cong., 1st and 2nd Sess. (1965-66). The committee reports, H. R. Rep. No. 1366, 89th Cong., 2d Sess. 16-17 (1966), and S. Rep. No. 1487, 89th Cong., 2d Sess. (1966), offer only this brief explanation:

> These enterprises which are not proprietary, that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose. Failure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which "constitute an unfair method of competition in commerce."

As is fully developed in the brief for Maryland and the other appellants, the facts, as stipulated in the court below, show without doubt that there is no competition between these state institutions and proprietary schools and hospitals. The states do not compete at all with proprietary institutions for hospital patients or school children. Thus they cannot compete unfairly, much less in commerce.

The rationale suggested in the committee reports was not relied on at all in any of the opinions in the court below. Judge Winter advanced two other bases on which he was able to find the requisite effect on interstate commerce. He showed first that the states, and local authorities, spend in excess of $42 billion per year on educational institutions and hospitals, and that a large proportion of the part of that sum allocated to

supplies and equipment is spent out of state. "Expenditures of this magnitude," he said, "are bound to have an enormous impact on interstate commerce." 269 F.Supp. at 833. This may be freely conceded. It may be conceded too that Congress is free to regulate such purchases as it may deem wise. The difficulty is making the leap from the admitted fact that these out-of-state purchases are "in" commerce to the conclusion that the wages and hours of the employees of these institutions therefore substantially affect commerce. There is a gap between premise and conclusion that no fact of which we have knowledge—or even any theory we are able to hypothesize—is able to fill. Judge Winter's later reliance on certain cases involving the Labor Relations Board, *id.* at 835-836, and his indication that the institutions would have no occasion to engage in commerce if the services of the employees here involved "were permanently withdrawn," *id.* at 836, does suggest one possibility. If the janitors, dishwashers, nurse's aids, and the like were all to leave these institutions because of dissatisfaction with their employment conditions, and the states were unable to obtain replacements, the states would have to close the institutions down and thereafter would not make purchases in interstate commerce to meet the needs of the institutions. Such an unfortunate contingency has not occurred in the past. The commitment of the states to perform these essential functions is such that it cannot be conceived that any state would allow it to occur in the future. Surely such a remote, speculative, and entirely unlikely possibility is not the "substantial impact" on commerce this Court has always said is needed.

The other connection Judge Winter found between

these state institutions and interstate commerce is that federal funds go to the institutions under a variety of programs, and thus there is "a regular interstate flow of funds." 269 F.Supp. at 834. Money can certainly be an article in commerce, and loan companies and the like operating across state lines are no less subject to regulation than businesses dealing in more tangible commodities. But to regard a grant from the federal government to a state or local school district as itself a transaction in or affecting interestate commerce is a novel concept, not supported in the decisions of this Court. We recognize that "it is hardly lack of due process for the Government to regulate that which it subsidizes." *Wickard v. Filburn,* 317 U.S. 111, 131 (1942). Virtually every federal statute authorizing grants to states or localities contains elaborate conditions to which the recipient agrees upon accepting the grant. Some power over labor standards, including wages and hours, is a commonplace in such statutes. E.g., 20 U.S.C. § 753 (higher education facilities); 23 U.S.C. § 113 (highways); 42 U.S.C. § 291e(a) (5) (hospitals); 42 U.S.C. § 2947 (economic opportunity programs). If the states do not wish to yield to such conditions, they have "the simple expedient of not yielding." *Massachusetts v. Mellon,* 262 U.S. 447, 482 (1923). It would be odd indeed if acceptance of funds granted by Congress under the spending power, on the conditions there specified, were to bring the states or their institutions under the commerce power, and authorize Congress to impose any additional regulations it might later deem desirable.

Judge Thomsen's opinion recognized that the court must examine "the effect which the action sought to be regulated has on interstate commerce," 269 F.Supp.

at 850, and noted the absence of congressional findings with respect to that relationship. *Ibid.* He left for another day consideration of "the effect, if any, which the State's overtime practices have on interstate commerce." 269 F.Supp. at 852. His opinion does not state what relationship he found between the wages of these employees and interstate commerce. Judge Northrop's dissent did not have to reach this issue.

There is one theory on which the wages—though probably not the hours—of state employees may be said to affect interstate commerce. If these employees are paid more, they will have more to spend. A portion of their expenditures will go for goods moving in interstate commerce and that commerce, and indeed the entire economy, will benefit thereby. If that theory is sound, the Commerce Clause empowers Congress to regulate the wages of every working person in the United States. Perhaps a hint of this is found in Judge Thomsen's reference to "the interest of the federal government, representing all the people of the United States, in seeing that all the people are paid an appropriate minimum wage." 269 F.Supp. at 851. It is, of course, no argument against the existence of such a power that Congress has not sought to exercise it to its ultimate extent, but it does have significance that neither Congress nor any court has yet sought to justify minimum wage legislation on such an analysis. Nor did such an analysis occur to those who pressed for the 1966 amendments. The Secretary of Labor was asked before the Senate committee whether the Act would apply to truck drivers working intrastate. He answered that it would not, and on being asked for the reason, said: "If it is really intrastate commerce there is no constitutional authority." *Amendments to the*

Fair Labor Standards Act, Hearings before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 89th Cong., 1st Sess., pt. 1, at 86 (1965). Mr. Andrew J. Biemiller, Director of Legislation, AFL-CIO, lamented the fact that domestic workers are not given wage protection, but said "the issue is tied to the problem of Federal jurisdiction and a decent wage floor for them probably depends on State action." *Id.* at 95-96.

If Congress can provide a minimum wage for every employee in the United States on the theory that this will increase purchasing power and thus benefit interstate commerce, it is hard to think of any regulation that could not be equally plausibly justified, and we would be back, in effect, to Professor Crosskey's view of the commerce power.

We submit—as seriously and as responsibly and as respectfully as we are able—that the reason neither Congress nor the court below could point to any relation between the wages and hours of these state employees and commerce among the several states is because there is no such relation.

II. The Special Position of States

Even if, contrary to the conclusion we have just advanced, a sufficient relation could be found between the wages and hours of these employees and interstate commerce to turn the color of legal litmus paper, that would not be the end of the inquiry. The regulation here challenged is not of private citizens or businesses. Instead it goes to the states, constituent members of the federal union, and the special position of states under the Constitution must be taken into account in determining whether Congress has gone too far.

When states operate railroads or own wharves and piers, they are required to conform to the Federal Safety Appliance Act, *United States v. California,* 297 U.S. 175 (1936), the Shipping Act, *California v. United States,* 320 U.S. 577 (1944), the Railway Labor Act, *California v. Taylor,* 353 U.S. 553 (1957), and the Federal Employers Liability Act, *Parden v. Terminal Ry Co.,* 377 U.S. 184 (1964). Each of these statutes is at the heart of the commerce power. "Commerce, undoubtedly, is traffic * * *." *Gibbons v. Ogden,* 9 Wheat. 1, 189 (1824). Application of these general statutes to the states had no destructive effect on the states.

Here, on the other hand, is a statutory regulation that goes to the outermost limit—if not, as we think, clearly beyond—of the commerce power. In determining whether it is within or without the shadowy line at the periphery of congressional power, the fact that states are involved, and that its effect on the states would be very serious, are considerations this Court may properly take into account. All three of the judges below found that application of this statute to these state institutions "will necessiate either increased taxes or a curtailment of essential services." 269 F. Supp. at 845 (Winter, J.). See also *id.* at 850-851 (Thomsen, J.), and *id.* at 853 (Northrop, J.). Education and care of the sick are among the most important functions state and local governments perform. This Court has recognized that in terms with regard to education. *Brown v. Board of Education,* 347 U.S. 483, 493 (1954). Any curtailment of these services would be a national tragedy. In many instances increased taxes is not a feasible alternative, even if Congress may properly compel such

tax increases, because of constitutional limits on tax rates.

The impact of this Act is not limited to the vital functions of education and care of the sick. The 1966 legislation strikes at the most important function of the states, that of governing their own affairs. Even the federal government, with its immense revenues, has recognized that there is not money enough for government to do everything it would like to do, and that it must choose how to allocate its resources. It must postpone or refrain from many desirable programs because other activities have a higher priority. The states and the school districts, with more limited revenue, must make even more difficult choices. To make these choices is the very essence of government. A state or a school district may think that its limited dollars are better spent in increasing the salary of its teachers rather than its janitors. Congress, by the 1966 legislation, has undertaken to deprive it of that choice, and to require that the pay of the janitors be increased, no matter what more urgent needs may beset the state.

This is not an argument against the wisdom of the 1966 legislation. Such an argument must be made in another place. It is an argument that Congress goes beyond constitutional bounds when it denies the states freedom to make their own assessment of the wisdom of a particular choice about the use of state funds.

As is recognized in all four of the opinions in *New York v. United States,* 326 U.S. 572 (1946), the states do enjoy a special status in our constitutional scheme, and there is a limit to the extent that powers that Congress may exercise to the fullest against private persons may be exercised against the states. "There are, of

course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. * * * These could not be included in any abstract category of taxpayers without taxing the State as a State." *Id.* at 582 (Frankfurter, J.). "All agree that not all of the former immunity is gone." *Id.* at 584 (Rutledge, J.). "* * * [A] federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." *Id.* at 587 (Stone, C. J.). "The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." *Id.* at 594 (Black, J.).

These expressions, and the line of cases they faithfully reflect, were thought not controlling below, on the theory that the tax power is limited and concurrent while the commerce power—and the war power—is concurrent. 269 F.Supp. at 845 (Winter, J.). *Id.* at 849 (Thomsen, J.).

It is quite true that the commerce power is plenary, to the extent that it exists, and that it "acknowledges no limitations, other than are prescribed in the constitution," *Gibbons v. Ogden,* 9 Wheat. 1, 196 (1924), but in that very sentence Chief Justice Marshall said that these attributes of the commerce power were "like all others vested in Congress." *Ibid.* It has been recognized here over and over again that the power to tax, the first of the powers given Congress in Article I, § 8, is no second-class power. It has been declared to be "the strongest, the most pervading of all the powers

of government," *Loan Association v. Topeka,* 20 Wall. 655, 663 (1874), "absolute and unlimited," *Tanner v. Little,* 240 U.S. 369, 380 (1916), and a "plenary power." *Burnet v. Harmel,* 287 U.S. 103, 110 (1932). A more careful statement is that "the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument * * *." *McCray v. United States,* 195 U.S. 27, 59 (1904). Similar expressions appear throughout the United States Reports. E.g. *Hylton v. United States,* 3 Dall. 171, 174 (1796); *License Tax Cases,* 5 Wall. 462, 471 (1866); *Pacific Insurance Co. v. Soule,* 7 Wall. 433, 443 (1868); *Flint v. Stone Tracy Co.,* 220 U.S. 107, 153 (1910).

Whether it be the commerce power, the war power, or the tax power that is involved, Congress may not "do violence to the presuppositions derived from the fact that we are a Nation composed of States." *New York v. United States,* 326 U.S. 572, 576 (1946).

The impact of the wages and hours of the employees of state schools and hospitals on interstate commerce is, at most, minimal. The impact of the 1966 legislation of the ability of the states to provide essential services and upon their soverign power to govern themselves is obvious and drastic. The legislation is unconstitutional.

CONCLUSION

The judgment below should be reversed with directions to grant the relief prayed for in the complaint.

Respectfully submitted,

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SUPREME COURT, U. S.

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No. 742

In the Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF MARYLAND, ET AL., APPELLANTS

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE APPELLEES

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument:	
Introduction and summary	4
I. The operation of State hospitals, schools and related institutions has a substantial effect upon interstate commerce, and Congressional regulation of the wages and hours of employees of such institutions is a valid exercise of the commerce power	8
II. The States enjoy no constitutional immunity from the Fair Labor Standards Act	15
III. Fair Labor Standards Act coverage of all the employees of an "enterprise engaged in commerce or in the production of goods for commerce" is constitutional	26
IV. Eleventh Amendment—Construction of Statute	28
Conclusion	33
Appendix	35

295-123—68——1

CITATIONS

Cases:

	Page
Aetna Finance Co. v. *Mitchell*, 247 F. 2d 190	32
Beneficial Finance Co. v. *Wirtz*, 346 F. 2d 340	32
Board of Trustees of the University of Illinois v. *United States*, 289 U.S. 48	17, 18, 20
California v. *Taylor*, 353 U.S. 553	17, 20
Case v. *Bowles*, 327 U.S. 92	18, 20, 21
Gibbons v. *Ogden*, 9 Wheat. 1	22
Katzenbach v. *McClung*, 379 U.S. 294	28
Kirschbaum Co. v. *Walling*, 316 U.S. 517	26
McComb v. *Frank Scerbo & Sons*, 177 F. 2d 137	29
McComb v. *Herlihy*, 161 F. 2d 568	32
Mitchell v. *Floyd Pappin & Son*, 122 F. Supp. 755	30
Mitchell v. *Kroger Company*, 248 F. 2d 935	32
Mitchell v. *Richey*, 164 F. Supp. 419	30
Mitchell v. *Sunshine Department Stores, Inc.*, 292 F. 2d 645	32
National Labor Relations Board v. *Central Dispensary & Emergency Hospital*, 145 F. 2d 852, certiorari denied, 324 U.S. 847	16
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1	27
National Labor Relations Board v. *Reliance Fuel*, 371 U.S. 224	27
New York v. *United States*, 326 U.S. 572	21, 25
Oklahoma v. *Guy F. Atkinson Co.*, 313 U.S. 508	21, 22
Parden v. *Terminal Railway Co.*, 377 U.S. 184	30

Cases—Continued

	Page
Polish National Alliance v. *National Labor Relations Board*, 322 U.S. 643	22, 28
Public Building Authority of Birmingham v. *Goldberg*, 298 F. 2d 367	32
Sanitary District v. *United States*, 266 U.S. 405	15, 16, 20
Sucrs. de A Mayol & Co. v. *Mitchell*, 280 F. 2d 477 certiorari denied, 364 U.S. 902	32
Tobin v. *Wilson*, 98 F. Supp. 131	30
United States v. *California*, 297 U.S. 175	6, 16, 17, 20, 29
United States v. *Darby*, 312 U.S. 100	5, 11, 25
United States v. *Ohio*, 385 U.S. 9	11, 20
United States v. *Texas*, 143 U.S. 621	7, 29
United States v. *Wrightwood Dairy Co.*, 315 U.S. 110	11, 27
Walling v. *Jacksonville Paper Co.*, 317 U.S. 564	32
Walling v. *Norfolk Southern Ry. Co.*, 162 F. 2d 95	29
Western Union v. *Lenroot*, 323 U.S. 490	32
Wickard v. *Filburn*, 317 U.S. 111	11, 27
Willmark Service System v. *Wirtz*, 317 F. 2d 486, certiorari denied, 375 U.S. 897	32
Wirtz v. *C & P Shoe Corp.*, 336 F. 2d 21	30
Wirtz v. *Jones* 340 F. 2d 901	29

Constitution and Statutes:

Constitution of the United States:

Commerce Clause	6, 11, 15, 22, 25, 26, 35
Supremacy Clause	25, 35
Tenth Amendment	6, 22, 24, 25, 35
Eleventh Amendment	7, 28, 29, 35

Constitution and Statutes—Continued

Fair Labor Standards Act of 1938:
Page
29 U.S.C. 202(a) 5, 36
29 U.S.C. 211(a) 29, 42
29 U.S.C. 219 ..... 30, 46
As originally enacted, 52 Stat. 1060, 29 U.S.C. (1940 ed.):
Section 2(a) 5
Section 203(d) 2
Section 206(a) 2
Section 207(a) 2
As amended in 1961 by Pub. L. 87-30, 75 Stat. 65, 29 U.S.C. (1964 ed.):
Section 203(d) 3, 36
Section 203(r) 2, 37
Section 203(s) 2, 27, 38
Section 206(b) 2, 40
Section 207(a)(2) 2, 41
29 U.S.C. 215 43
29 U.S.C. 216(a) 28, 43
29 U.S.C. 216(b) 28, 30, 43
29 U.S.C. 216(c) 29, 30, 44
29 U.S.C. 217 ..... 29, 30, 46
As amended in 1966 by Pub. L. 89-601, 80 Stat. 830, 29 U.S.C. (1964 ed. Supp. II):
Section 201 35
Section 202 35
Section 202(a) 36
Section 202(b) 36
Section 203 36
Section 203(b) 36
Section 203(c) 36
Section 203(d) 3, 36

Constitution and Statutes.—Continued
Fair Labor Standards Act of 1938—Con.
As amended in 1966 by Pub. L. 89–601—Continued
Page
Section 203(i) 31, 37
Section 203(j) 32, 37
Section 203(q) 37
Section 203(r) 37
Section 203(s) 27, 31, 38
Section 203(s)(4) 3, 39
Section 203(v) 39
Section 203(w) 39
Section 206(a) 39
Section 206(b) 30, 40
Section 207(a)(1) 40
Section 207(a)(2) 3, 30
Section 207(j) 41
Section 213(a)(1), (2) 42
Section 213(b)(8) 42
National Labor Relations Act, 29 U.S.C. 151:
Section 159(c) 27
Section 160 27
Reorganization Plan No. 6 of 1950, 64 Stat. 1263 28
28 U.S.C. 2282 1
28 U.S.C. 2284 1
Miscellaneous:
Annals of Cong. (1791) 25
1 Bancroft, *History of The Formation of the Constitution of the United States* (1882) 22
1 Elliot, *Debates on the Federal Constitution* (2d ed. 1836) 22

Miscellaneous:—Continued

	Page
Hamilton, *The Federalist*, No. XXXIV p. 147	24
H. Rep. No. 1366, 89th Cong., 2d Sess	9, 13
Madison's *Debates*, as reported in H. Doc. No. 398, 69th Cong., 1st Sess., entitled "Documents Illustrative of the Formation of the Union of the American States"	23
S. Rep. No. 145, 87th Cong., 1st Sess	27
University of California Institute of Governmental Studies, *Strikes by Public Employees, Professional Personnel, and Social Workers:* A Bibliography	12
U.S. Dept. of Labor Summary Release, *Work Stoppages Involving Government Employees, 1966*	12
Warren, *The Making of the Constitution* (1928)	22, 24

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE APPELLEES

OPINIONS BELOW

The opinions of the three-judge district court (App. 1a) are reported at 269 F. Supp. 826.

JURISDICTION

This action to enjoin the enforcement of the Fair Labor Standards Act, 29 U.S.C. 201, on the grounds that the provisions of the Act extending its coverage to State employees are unconstitutional, was heard by a three-judge district court convened pursuant to 28 U.S.C. 2282 and 2284. That court denied all injunctive relief and dismissed the action on June 26, 1967 (App. 51a).

Notice of appeal to this Court was filed on August 24, 1967, and probable jurisdiction was noted on Jan-

uary 15, 1968 (389 U.S. 1031). The jurisdiction of the Court rests on 28 U.S.C. 1253.

QUESTION PRESENTED

Whether a schedule of minimum wages and maximum hours prescribed by Congress in the 1966 Amendments to the Fair Labor Standards Act may be consitutionally applied to employees of the States (or political subdivisions) engaged in the operation of hospitals, schools and related institutions.

STATUTES INVOLVED

The relevant provisions of the Constitution and of the Fair Labor Standards Act are set forth in the Appendix to this Brief, infra, pp. 35–46.

STATEMENT

The Fair Labor Standards Act, as originally enacted in 1938, required employers covered by the Act to pay those of their employees who were engaged in commerce or in the production of goods for commerce a minimum wage, as well as one and one-half times their normal rate of pay for hours worked in excess of 40 hours per week. 29 U.S.C. (1940 ed.) 206(a), 207(a). The States and their political subdivisions were excluded from the Act's coverage. 29 U.S.C. (1940 ed.) 203(d).

In 1961 Congress extended the coverage of the Act beyond employees personally engaged in commerce or in the production of goods for commerce, to all the employees of certain "enterprises" which had some employees so engaged. Pub. L. 87-30, 75 Stat. 65; 29 U.S.C. (1964 ed.) 203(r), 203(s), 206(b), 207(a)(2).

The States and their political subdivisions remained among the employers excluded from the Act's coverage, 29 U.S.C. (1964 ed.) 203(d).

In the 1966 Amendments to the Act, Pub. L. 89–601, 80 Stat. 830, Congress extended the Act's coverage to enterprises operating "a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education," 29 U.S.C. (1964 ed., Supp. II) 203(s)(4), and also amended the definition of covered employers to include the States and their political subdivisions with respect to employees employed in such institutions, 29 U.S.C. (1964 ed., Supp. II) 203(d). Thus, for the first time, the minimum wage and overtime provisions of the Act were made applicable to the States and their political subdivisions. The relevant schedules are as follows:

Effective Date	*Minimum Wages*	*Maximum Hours*[1]
Feb. 1, 1967	$1.00 per hour	44 hours
Feb. 1, 1968	$1.15 per hour	42 hours
Feb. 1, 1969	$1.30 per hour	40 hours
Feb. 1, 1970	$1.45 per hour	40 hours
Feb. 1, 1971	$1.60 per hour	40 hours

The State of Maryland, subsequently joined by twenty-seven other States and one school district, brought this action to enjoin, as unconstitutional, enforcement of the Act insofar as it applied to the oper-

[1] The Maximum Hours specified are per workweek. Overtime, at the rate of time and one-half, must be paid under the Act for work each week in excess of those maximum hours. 29 U.S.C. 207(a)(2).

ation of public hospitals, schools and similar institutions.[2] On the basis of stipulated facts, a three-judge district court dismissed the action. 269 F. Supp. 826 (D. Md.). Each judge, however, wrote a separate opinion. Judge Winter concluded that the application of both the minimum wage and the overtime provisions of the Act to the States and their political subvisions was constitutional. Judge Thomsen joined Judge Winter in upholding the minimum wage provisions, in denying all injunctive relief and in ordering the action dismissed; but he expressed the view that the "denial of relief in this case should be without prejudice" to the right of the States to assert "in future cases" that the overtime provisions of the Act unduly interfered with indispensable state functions.[3] Judge Northrop dissented. 269 F. Supp. at 852, App. 45a.

ARGUMENT

INTRODUCTION AND SUMMARY

The Fair Labor Standards Act, 29 U.S.C. 201, *et seq.*, was first enacted in 1938 (52 Stat. 1060) as a

[2] While the 1966 Amendments also extended the minimum wage and overtime coverage to State employees engaged in the operation of various transportation facilities such as railways, buses and trolleys, appellants do not challenge that aspect of the Act.

[3] Judge Thomsen's view requires that the "extent of the interference with an indispensable state function," alleged by appellants to be brought about by application of the Act's overtime provisions, be balanced against the "effect, if any, which the State's overtime practices have on interstate commerce." In his view, this balancing could be properly done only in "future cases presenting specific situations" concerning those overtime practices. 269 F. Supp. at 852, App. 36a, 44a–45a.

result of Congressional findings, set forth in Section 2(a) of the Act, that:

> the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

As part of the comprehensive legislative plan to eliminate harmful labor conditions and their effects, the Act requires that covered employers pay to their employees at least a minimum wage for all hours worked and a premium for all hours worked in excess of maximum limitations.

The original Act was upheld as a valid regulation of commerce in *United States* v. *Darby;* 312 U.S. 100. We submit that the extension of the Act's coverage to employees of State-operated schools and hospitals is also constitutional.

The facts of record in this case clearly establish that Congress could reasonably have determined that the operation of schools and hospitals has a substantial impact on interstate commerce. The stipulated

facts show that in one year over 38 billion dollars is spent in the operation of public educational institutions and 3.9 billion dollars is spent for operating public hospitals. In almost all cases, major portions of the supplies purchased for these institutions move in interstate commerce. Congress was, no doubt, aware of the increase in the number of strikes by public employees which have occurred in recent years. Thus Congress could reasonably have concluded that it was appropriate to regulate wages and hours of employees of these institutions to prevent labor disputes which could affect the flow of goods in commerce. In addition, in determining to extend the Act's coverage to schools and hospitals it was not inappropriate for Congress to conclude that it would be unfair to extend the Act's coverage to private schools and hospitals but not to similar public institutions.

There is no adequate basis for appellants' contention that considerations of federalism prohibit Congress from extending the coverage of the Act to State employees. This Court has consistently held that "The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution", and that considerations of state sovereignty afford "no * * * limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual." *United States* v. *California*, 297 U.S. 175, 184–185. Nothing in the decided cases, or in the history of the adoption of either the Commerce Clause or the Tenth Amendment, supports the view that the States are

in any way immune from regulations adopted by Congress to regulate commerce.

Nor was it unconstitutional for Congress to extend the minimum wage and overtime provisions of the Act to all employees of an enterprise which has some employees engaged in commerce or in the production of goods for commerce. It was not unreasonable for Congress to conclude that labor unrest among those employees whose jobs do not directly affect commerce could have a substantial impact on the work of those employees whose work does directly affect commerce. Thus, in order to insure that commerce was not disrupted, it was appropriate for Congress to extend the Act's coverage to all the employees of such an enterprise.

Appellants' contention that the Eleventh Amendment renders the 1966 Amendments unconstitutional is patently without merit. The argument wholly ignores the fact that in addition to authorizing suit by the individual employee, the Act authorizes the Secretary of Labor, who speaks for the United States, to bring an action to enjoin violations, and also to recover back pay due employees. Thus, even if the Eleventh Amendment precluded suit by the individual employee, it could still be enforced against the States through suit brought for the United States by the Secretary of Labor. See *United States* v. *Texas,* 143 U.S. 621.

Finally, appellants' claim that the Act by its own terms is not applicable to hospital and school employees because these institutions are the ultimate consumers of the goods which they purchase, is both

factually and legally unsound. First, it does not appear that the appellants are the ultimate consumers of all of the supplies which they purchase. But even if they were the ultimate consumers, their employees would nonetheless be engaged in commerce or in the production of goods for commerce and would thus be within the Act's coverage under its plain language.

I. THE OPERATION OF STATE HOSPITALS, SCHOOLS AND RELATED INSTITUTIONS HAS A SUBSTANTIAL EFFECT UPON INTERSTATE COMMERCE, AND CONGRESSIONAL REGULATION OF THE WAGES AND HOURS OF EMPLOYEES OF SUCH INSTITUTIONS IS A VALID EXERCISE OF THE COMMERCE POWER

Appellants first contend that the attempt to extend the Act's coverage to State schools and hospitals is unconstitutional because the operation of these facilities does not have a sufficient effect on commerce to subject them to federal regulation under the commerce clause. They make two points: (1) that the legislative history of the Act does not establish a sufficient predicate for extending coverage to such institutions, and (2) that, in fact, the Act's regulation of the wages and hours of the employees of such institutions is not necessary to the protection of commerce.

Insofar as the complaint rests on an alleged inadequacy of legislative findings, it is plainly without merit. Since the amending statute merely extended the basic coverage of the original Act, it is not surprising that it contained no formal findings or statement of policy. As the committee report accompanying the new legislation expressly recognizes, "The bill seeks to implement the policy of the Act by * * * ex-

tending the benefits and protection of the Act to an estimated 7,243,000 workers engaged in commerce or in the production of goods for commerce, or employed in enterprises engaged in commerce or in the production of goods for commerce * * *." H. Rep. No. 1366, 89th Cong., 2d Sess., p. 2. Moreover, the report recites the original congressional findings, emphasizing their continuing relevance. Two of them, especially, may be noticed: (1) that the practice of some employers of underpaying and overworking their employees constitutes an unfair method of competition in interstate commerce; and (2) that the existence of such conditions leads to labor disputes burdening and obstructing the free flow of goods in commerce. These findings are fully sufficient to sustain the challenged legislation.

It remains only to inquire whether the congressional assumption has been shown to have been unfounded in fact. Certainly, there can be no dispute about the impact of public school and hospital operations on interstate commerce. Judge Winter summarized the stipulations as follows, 269 F. Supp. at 833–834, App. 11a–12a:

> In the current fiscal year an estimated $38.3 billion will be spent by State and local public educational institutions in the United States. In the fiscal year 1965, these same authorities spent $3.9 billion operating public hospitals. * * *
>
> For Maryland, which was stipulated to be typical of the plaintiff States, 87% of the $8 million spent for supplies and equipment by its public school system during the fiscal year 1965

represented direct interstate purchases. Over 55% of the $576,000 spent for drugs, x-ray supplies and equipment and hospital beds by the University of Maryland Hospital and seven other state hospitals were out-of-state purchases. With respect to seven other state hospitals which spent $875,000 on such items during the comparable period, the parties have stipulated that all or "the most part" of such items were manufactured outside of Maryland.

In Ohio, also stipulated to be typical of all of the plaintiff States, there are 708 school districts, 3 of which (stipulated to be typical of the other school districts) purchased a total of $323,000 in supplies in the fiscal year 1966. Approximately 50% of these purchases were directly from outside of the state. Ohio's six state universities spent $9 million on certain specified supplies in that year, over 42% of which were purchased directly from out-of-state, with an undetermined portion of the remainder being manufactured outside the state.

In Texas, all text books originate outside the state, and it is stipulated that "the major portion" of drugs and hospital equipment is either purchased directly from out of the state or is at least manufactured in other states.

The interstate flow of school and hospital supplies and equipment is, in large part, inevitable because of the nondiffusion of manufacturing supplies. For example, there are no Maryland suppliers for fourteen out of eighteen major categories of school supplies and equipment. Even larger States, such as Ohio and Texas, have no producers, or very few pro-

ducers, of text books, science equipment and physical education equipment.

These facts alone suggest that the operation of schools and hospitals has a sufficient impact on interstate commerce to bring them within the power of Congress under the Commerce Clause.[4] For as this Court recognized in *Wickard* v. *Filburn,* 317 U.S. 111, 125, even though "activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." See also, *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 119; *United States* v. *Darby,* 312 U.S. 100, 119–120; *United States* v. *Ohio,* 385 U.S. 9. Appellants argue, however, that the regulation of minimum wages and hours is not necessary to the protection of commerce.

1. Despite the general congressional finding to the contrary, appellants assert that the wages and hours of covered employees of the public schools and hospitals will not affect the volume of interstate purchases made by the institutions because the commitments of the States to furnish the services involved is unre-

[4] The court below seemed to be in complete agreement on this point. Judge Winter concluded that, "[l]eaving aside for the moment the question of state sovereignty, * * * these activities are clearly within the power of Congress to regulate commerce." 269 F. Supp. at 834. Judge Thomsen agreed that "the operation of schools and hospitals by the several States and their subdivisions affects interstate commerce to a substantial degree, whether or not such operations themselves constitute interstate commerce." 269 F. Supp. at 847, App. 36a. Even Judge Northrop, in dissenting from the holding, did not question that the regulated activities of the States were, apart from state sovereignty, within the Congressional power to regulate commerce.

lated to employer-employee relations. That assumption does not bear scrutiny.

Congress must certainly have been aware of the increasing frequency of labor disputes and strikes of public employees. See University of California Institute of Governmental Studies, *Strikes by Public Employees, Professional Personnel, and Social Workers: A Bibliography.*[5] And it is common knowledge and experience that labor disputes and strikes, particularly those of long duration, have some effect on the continuation and extent of the services provided by public institutions, and a corresponding effect on the volume of their interstate purchases. Indeed, a strike of even a small group of employees often has an effect far beyond the withheld services of these employees, for other organized laborers, both within and without the employ of the affected employer, may support and respect the efforts of the strikers. Appellants stray from reality in their assertion that labor disputes involving their employees in these institutions and arising from low wages and excessive hours would have no effect upon their interstate purchases.

2. There is, moreover, an additional reason for extending coverage to public schools and hospitals. Con-

[5] In 1966, according to data collected by the Bureau of Labor Statistics on work stoppages by employees of state and local governments, there were 54 work stoppages in "public schools and libraries", resulting in 78,300 man days of work lost, and 17 work stoppages in "hospitals and other health services", resulting in 23,400 man days of work lost. Among all other categories of state and local government employees there were a total of 71 work stoppages, resulting in a loss of 353,140 man-days of work. (Summary Release, Work Stoppages Involving Government Employees, 1966, U.S. Dept. of Labor).

gress expressly found that such public and non-profit institutions are "engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose," and that "[f]ailure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which 'constitute an unfair method of competition in commerce.'" H. Rep. 1366, 89th Cong., 2d Sess., 16–17.

Appellants have failed to show that the prevention of competition which would be unfair to regulated enterprises did not furnish a rational basis for Congressional regulation of public institutions in order to protect commerce. Imposition of wage and hour requirements on one segment of an industry clearly gives the remaining segment of the industry a competitive advantage and imposes upon the regulated segment corresponding difficulties in maintaining its competitive position. Indeed, appellants do not appear to dispute that fairness in competition ordinarily precludes regulation of only a portion of an industry. Their objection to the application of principles of competitive fairness to them stems from their belief that where the segment of the industry initially proposed to be regulated is small compared to the remaining segment, the justification for the application of those principles somehow disappears.[6]

[6] The Court should note that the appellants are incorrect in arguing that the segment initially proposed to be "legitimately regulable" represented only ½ to 1% of the industry. Brief of Appellants, p. 20. Admittedly certain types of medical care may be available only in public institutions. But the stipula-

However, it was not unreasonable for Congress to assume that the relative smallness of the private segments of the industry does not detract from the desirability of competitive fairness. In short, the appellants have presented no compelling reason for this Court to find that considerations of competitive fairness did not constitute a rational basis for Congressional extension of the coverage of the Fair Labor Standards Act to public institutions, particularly where the operation of such institutions has a substantial impact on the flow of goods in commerce.

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tions of fact reveal that as to hospitals generally in the three States concerned, roughly half of the beds in all hospitals are found in private institutions, and further that only 15 to 25% of the total admissions to all hospitals are to public institutions. App. 114a, 118a, 120a. For the United States as a whole, almost three-quarters of all admissions are to private hospitals, Stipulation Between Plaintiffs and Defendants, Exhibit A–4 (Hospitals—United States), Attachment A. Private hospitals account for almost 60% of the total expenditures for all hospitals, *id.*, Attachment B; App. 122a.

With respect to schools in the three States, public elementary and secondary schools account for between 80 and 94 percent of the total enrollment, App. 112a, 117a, 119a, while public institutions of higher education attract between two-thirds and three-fourths of all pupils. App. 113, 117a, 119a. For the United States as a whole, over one-eighth of the elementary and secondary school pupils attend private schools, Stipulation Between Plaintiffs and Defendants, Exhibit A–4, (Schools—United States) Attachment A, while over one-third of the enrollment in higher education is in private institutions, *id.*, Attachment B. Expenditures by private schools accounted for similar proportions of the expenditures for all schools, *id.*, Attachment C.

II. THE STATES ENJOY NO CONSTITUTIONAL IMMUNITY FROM THE FAIR LABOR STANDARDS ACT

The appellants claim, in effect, that an unconstitutional interference with the operations of state government will result from the application of the $1.00–$1.60 per hour minimum wage and time and one-half for overtime provisions to certain employees of public hospitals, schools and related institutions. They argue that the fundamental structure of our constitutional form of government precludes Congress from imposing the minimum wage and overtime schedule on the "essential" and "purely governmental" functions of the States.

However, the uniform decisions of this Court make it plain that Congress may regulate State activities which have a substantial effect upon commerce. And this Court has made it equally clear that the fact that the State activity may be "purely governmental" or "an essential State function" does not immunize it from regulation under the Commerce power.

1. In *Sanitary District* v. *United States,* 266 U.S. 405, the Sanitary District diverted water from Lake Michigan to dispose of sewage from the City of Chicago. This action was taken to protect the health of the residents of the City and was undoubtedly an essential State function.[7] The United States sued to enjoin the diversion of water, claiming that it conflicted with

[7] This State activity also appears to have had all the characteristics which the States claim for activities now covered by the Fair Labor Standards Act. It was non-profit, purely governmental, and economically not replaceable by a non-governmental system. We note that the public institutions sought to be regulated here have private counterparts, so that the description

the power of the United States to regulate interstate commerce. Mr. Justice Holmes, speaking for a unanimous Court, stated, 266 U.S. at 426, that the power and authority of the United States to remove obstructions to interstate and foreign commerce was, without question, "superior to that of the States to provide for the welfare or necessities of their inhabitants."

The Court's implicit rejection in *Sanitary District* of the "governmental function" test was expressly articulated in *United States* v. *California,* 297 U.S. 175. There, the State argued, 297 U.S. at 183, that in operating a harbor railroad "without profit, for the purpose of facilitating the commerce of the port * * * it is engaged in performing a public function in its sovereign capacity" and thus could not be constitutionally subjected to Congressional regulation under the Safety Appliance Act.[8] The Court deemed it "unimportant to say whether the state conducts its rail-

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"purely governmental" is not particularly appropriate. That the activities are "non-profit" is, of course, not significant, *National Relations Board* v. *Central Dispensary & Emergency Hospital,* 145 F. 2d 852 (C.A.D.C.), certiorari denied, 324 U.S. 847.

[8] The State's argument was identical to the argument reasserted by appellants here. The State pointed out, at page 11 of its brief (No. 33, Oct. Term, 1935), that:

> "It is of the utmost concern to a state that its ports and harbors be properly managed, controlled and regulated in order to promote the general benefit of the body politic, and when a state manages and controls its ports and harbors with that end in view and not activated by a desire for profit, the state is acting in its sovereign capacity."

The State then argued, at page 14 of its brief, that:

> "If it may be said, that the State of California in the operation of the State Belt Railroad is subject to the provisions of the Federal Safety Appliance Act, it follows that the State of California, in the exercise of its govern-

road in its 'sovereign' or in its 'private' capacity." The only question the Court found it necessary to consider was "whether the exercise of that [State] power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government." 297 U.S. at 183–184. The answer, of course, was that it must be.

In *California* v. *Taylor,* 353 U.S. 553, 568, it was argued that Congressional regulation of commerce, through the Railway Labor Act, would interfere with and control the employment relationship existing between the State and its employees. But the Court found (*ibid.*), that the principle enunciated in *United States* v. *California* was fully applicable, for the State, by engaging in interstate commerce, had "subjected itself to [the commerce] power so that Congress can regulate its employment relationships."

In *Board of Trustees of the University of Illinois* v. *United States,* 289 U.S. 48, the University protested the requirement that it pay duty on scientific apparatus which it imported for use in one of its educational departments.[9] This Court unanimously stated, 289 U.S. at 56–57, that it was an essential

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mental function in facilitating the commerce of its principal port, may exist only by leave of the federal government, and that the power lies with that government to prevent the State from discharging its sovereign functions for the general welfare of the people of California."

[9] There again the argument of state immunity was heard, this time with particular relevance to the case at hand, for the State function involved was that of providing an education for its citizens. The State pointed out, at page 13 of its brief (No. 538, Oct. Term, 1932), that the education of its citizens

attribute of the power to regulate foreign commerce that it is exclusive and plenary and could not be "limited qualified, or impeded to any extent by state action." Explaining further, the Court stated, 289 U.S. at 59, that the "fact that the States in the performance of state functions may use imported articles does not mean that the importation is a function of the state government independent of federal power. The control of importation does not rest with the State but with the Congress." Similarly, where, as here, the States, in performing their functions, engage in activities which affect commerce, those activities must be subject to the federal power to insure that they do not burden or restrict commerce.

The result has been the same where the war power was concerned. In *Case* v. *Bowles,* 327 U.S. 92, the State of Washington sold timber from lands held for the support of its schools at a price exceeding that prescribed under the Emergency Price Control Act. The Price Administrator sued to enjoin the completion of the transaction. The State argued, 327 U.S. at 101, that this sale could not be constitutionally sub-

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was one of those "certain services which, through long experience and by common consent, have come to be looked on as peculiarly within the province of government, and which, although private corporations may, to a limited degree, perform some of them, are, nevertheless, such that the public interest is deemed better served by having the activities either under the control of, or performed by the government itself."

The State then argued, page 22 of its brief, that a limitation on the power to regulate foreign commerce was that it should not be "exerted by Congress as directly and substantially to burden or embarrass the States in the exercise of strictly governmental activities."

ject to the Act because it was "for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens."[10] The contention that the extent of the Congressional power depended on whether the State functions being regulated were "essential" to the State government was again rejected.

The appellants would distinguish all these cases on the grounds either that the State activities involved were ordinary commercial activities or that the impact of the federal regulation on the States was small and did not interfere with the essential sovereignty of the States. To some degree, these differences exist. But the important consideration is that the Court's decisions in these cases in no way turn on the nature of the activities involved or the extent of the impact upon the States.

Although the State activities in the two California railroad cases were of a "commercial" nature, the Court deemed it "unimportant to say whether the state

[10] The State's argument was as follows, at pages 68–69 of its brief (No. 261, Oct. Term, 1945):

> "In selling the state school sections, the state is engaged in a governmental function. * * * It has long been a recognized principle of our jurisprudence that the Federal Constitution impliedly prohibits the Federal Government from passing any laws which obstruct or unreasonably threaten to obstruct any function essential to the continued existence of state government. * * * Where the court has upheld the power of Congress to impose burdens on the activities of the states, it has been in that field where the function involved was not essential to the maintenance of the state government. * * * In the instant case, the state has not sought to compete in a field usually reserved for private business."

conducts its railroad in its 'sovereign' or in its 'private' capacity,". *United States* v. *California,* 297 U.S. 175, 183. In *Sanitary District,* the disposal of the sewage from the City of Chicago was not a "commercial" function, but was a measure directly concerned with the health of the State's citizens. And the State function involved in *Case* v. *Bowles, supra,* 327 U.S. 92, and *Board of Trustees of the University of Illinois* v. *United States, supra,* 289 U.S. 48, was the education of its citizens. Thus, the very function here asserted by the States to be immune from federal regulation has been held by this Court not to have that immunity. See also *United States* v. *Ohio, supra,* 385 U.S. 9. Further, the nature of the regulation is not invalid for in *California* v. *Taylor, supra,* 353 U.S. at 568, the argument was unavailing that the regulation "interfere[d] with the 'sovereign right' of a State to control its employment relationships."

The fact that the States may have to levy additional taxes or curtail necessary services has also been rejected as a basis for invalidating an otherwise valid Congressional regulation. In *Sanitary District* v. *United States, supra,* 266 U.S. at 432, the Court noted that, even though the dangers to which the City of Chicago would be subjected by a ruling in favor of the United States—including a claim that it was faced with the loss of one hundred million dollars—were probably exaggerated, "in any event we are not at liberty to consider them here as against the edict of a paramount power."

In all the cases cited, the Congressional regulation presumably imposed additional costs upon the State functions. The principle developed was not that the

amount of those costs was small, and therefore did not really interfere with State government. Rather, the principle was simply that the fact of interference was not to be considered. In *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U.S. 508, it was alleged that federal activity, under the commerce power, in constructing a dam would, by flooding certain areas of Oklahoma, diminish the States' property tax revenues and destroy school buildings. This Court stated, 313 U.S. at 534, that

> The possible adverse effect on the tax revenues of Oklahoma as a result of the exercise by the Federal Government of its power of eminent domain is no barrier to the exercise of that power. * * *[11]

It necessarily follows that any balancing of the need for, and benefit to commerce derived from a federal regulatory scheme against the impact it has on the States and the interference with State func-

[11] The appellants' reliance on the opinions rendered in *New York* v. *United States*, 326 U.S. 572, to support immunity of essential State functions from federal regulation under the commerce power is misplaced. Whatever the import of those various opinions with respect to limitations on the levying of federal taxes on organs or instrumentalities of the States, any analogy attempting to limit the exercise of the commerce power is inappropriate.

The nature of the commerce power is, like the war power, *Case* v. *Bowles*, *supra*, 327 U.S. 92, such that its exercise cannot be limited if the ends for which it was designed are to be accomplished. If the essential activities of the States burden commerce, the paramount nature of the federal power would be frustrated if it could not require that the burden be removed. The taxing power, on the other hand, does not have ends which would be comparably frustrated if a particular manner of its exercise were proscribed.

tions which it creates is for Congress alone. In *Oklahoma* v. *Guy F. Atkinson Co., supra,* 313 U.S. at 527–528, this Court stated that the questions, similar to those raised here, of impact upon the government of the States,

> * * * raise not constitutional issues but questions of policy. They relate to the wisdom, need, and effectiveness of a particular project. They are therefore questions for the Congress, not the courts. * * *
>
> Nor is it for us to determine whether the resulting benefits to commerce as a result of this particular exercise by Congress of the commerce power outweigh the costs of the undertaking * * *

See, also, *Polish National Alliance* v. *National Labor Relations Board,* 322 U.S. 643, 650; *Gibbons* v. *Ogden,* 9 Wheat. 1, 197.

2. Nor is there merit to appellants' argument that the history of the adoption of the Commerce Clause and the Tenth Amendment shows that the commerce power cannot extend to the regulation of activities of a governmental nature carried on by the States. This contention overlooks the fact that a primary purpose of the Fair Labor Standards Act is the removal of obstructions to interstate commerce, the very problem that led to the adoption of the Commerce Clause.

The Constitutional Convention met chiefly because the Articles of Confederation had failed to give the federal government power to regulate commerce.[12]

[12] See 1 Elliot, *Debates on the Federal Constitution* (2d ed. 1836), 92, 106–119; 1 Bancroft, *History of the Formation of the Constitution of the United States* (1882), 250; Warren, *The Making of the Constitution* (1928), 85.

The resolution of the Convention which formed the basis for the drafting of the Commerce Clause read as follows:[13]

> VI. Resolved, That the national legislature ought to possess the legislative rights vested in Congress by the confederation; And moreover, to legislate in all cases for the general interests of the union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.

That this intended a broad grant of power to the federal Congress is clear when we contrast the language of an earlier resolution, which was defeated:[14]

> to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the Government of the individual States in any matters of internal police which respect the Govt. of such states only, and wherein the general welfare of the U. States is not concerned.

The inference the appellants attempt to draw from the lack of objection to the eventual form of the Commerce Clause is thus unjustified. The Framers recognized the need for national power to eliminate the obtructions to commerce which had plagued the country under the Articles of Confederation. But that power obviously cannot be limited to eliminating only

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[13] Madison's *Debates*, as reported in H. Doc. No. 398, 69th Cong., 1st Sess. (1927), entitled "Documents Illustrative of the Formation of the Union of the American States," 389, 466.

[14] *Id.*, at 388–89.

those obstructions then existing. The Framers did not use language which would restrict the federal power to the method of regulation immediately necessary. They were acutely conscious that they were preparing an instrument for ages to come, not a document adapted only for the exigencies of the time:

> * * * we must bear in mind, that we are not to confine our view to the present period, but to look forward to remote futurity. * * * Nothing therefore can be more fallacious, than to infer the extent of any power proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a *Capacity* to provide for future contingencies, as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity. * * *

Hamilton, *The Federalist,* No. XXXIV, p. 147. See also Warren, *The Making of the Constitution,* at 82.

Nor is there any support for the view that the Tenth Amendment reduced the power given to the national government. This is clear from the language of the Amendment, which reserves to the States only the "powers not delegated to the United States." It was also made clear by its sponsor, James Madison, who, while the Amendment was pending, explained its effect in the course of the debate concerning the national bank:

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might ex-

> ercise it, although it should interfere with the laws, or even the Constitution of the States.[15]

As this Court recognized in *United States* v. *Darby, supra,* 312 U.S. at 124:

> The amendment states but a truism that all is retained which has not been surrendered: * * *
>
> From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. * * *

Thus, nothing in the history of the adoption of the Commerce Clause or the Tenth Amendment detracts from the consistent recognition which this Court has given to the fact that States and their subdivisions may be required to comply with legislation adopted by Congress pursuant to its power to regulate and protect commerce. Nor need the Court be concerned with the possibilities, which appellants have conjured up, of the federal government using the commerce power to regulate the wages and hours of all State officials. "The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency." *New York* v. *United States,* 326 U.S. 572, 583 (opinion of Frankfurter, J.). Here the Congress has determined only that the minimum wage and overtime provisions of the Fair Labor Standards

[15] Annals of Cong. (1791), 1897. This principle, of course, is declared in the Supremacy Clause of the Constitution, under which state law must yield to federal law.

Act, which apply to more than 75% of the non-supervisory employees of private enterprise, should also be applied to employees of schools and hospitals regardless of whether those institutions are privately or publicly operated. In light of the substantial impact which the operation of such institutions have on commerce, there is no reason to find that Congress has exceeded its constitutional power "to regulate Commerce."

III. FAIR LABOR STANDARDS ACT COVERAGE OF ALL THE EMPLOYEES OF AN "ENTERPRISE ENGAGED IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE" IS CONSTITUTIONAL.

The appellants contend that the Act's use of the "enterprise" concept to bring within its coverage all employees of an activity which has some employees engaged in commerce constitutes an unconstitutional extension of the Commerce power (App. Br. 68–73). Although the coverage of the Act was originally limited to those employees personally engaged in commerce or the production of goods for commerce, this Court recognized that such coverage was "not coextensive with the limits of the power of Congress over commerce" and that "Congress chose not to enter areas which it might have occupied." *Kirschbaum Co.* v. *Walling,* 316 U.S. 517, 522–523.

It cannot be doubted that labor unrest among employees whose jobs do not directly affect commerce may have a substantial impact on commerce since it can disrupt the work of other employees of the same enterprise whose jobs do directly affect commerce. Indeed, this fact was recognized by Congress in ex-

tending the coverage of the National Labor Relations Act to all representation questions or unfair labor practices "affecting commerce." 29 U.S.C. 159(c), 160. This Court has consistently upheld this broad grant of jurisdiction to the National Labor Relations Board. See, *e.g., National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1; *National Labor Relations Board* v. *Reliance Fuel Oil Corporation*, 371 U.S. 224.

Appellants contend, however, that, as applied here, the enterprise concept extends the coverage of the Fair Labor Standards Act to employees who have no effect on commerce (App. Br. p. 73). But this contention ignores the fundamental requirement of enterprise coverage, 29 U.S.C. 203(s), that some of the employees be personally engaged in commerce or in the production of goods for commerce. Where some employees are so engaged, it necessarily follows that the activities of their employer affect commerce.[16] This being so, it is clearly within the power of Congress to regulate the wages and hours of all the employees of that employer, even though some of the employees are engaged in purely local activities. See *Wickard* v. *Filburn*, 317 U.S. 111; *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119; *National Labor Relations Board* v. *Reliance Fuel, supra.*

Nor is there merit to appellants' contention that the enterprise concept is unconstitutional because it

[16] As pointed out by the Senate Report in commenting on this test, "It is settled that an employer is engaged in commerce or in the production of goods for commerce where he has employees so engaged (*Kirschbaum* v. *Walling*, 316 U.S. 517; and see *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178)." S. Rep. No. 145, 87th Cong., 1st Sess., p. 43.

would extend coverage to an entire enterprise even though only a small proportion of the employees are engaged in commerce. In determining the constitutional significance of the impact of the activities of such an enterprise on interstate commerce it is appropriate to consider "the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish National Alliance* v. *National Labor Relations Board,* 322 U.S. 643, 648; see *Katzenbach* v. *McClung,* 379 U.S. 294.

IV. ELEVENTH AMENDMENT—CONSTRUCTION OF STATUTE

Appellants' remaining contentions—that the Act is unconstitutional because it conflicts with the Eleventh Amendment, and that the Act should be construed as inapplicable to the operation of hospitals, schools and related institutions—completely ignore relevant provisions of the Act.

1. The Fair Labor Standards Act contains both criminal penalties for its violation, 29 U.S.C 216(a), and civil remedies under which the Act's provisions may be enforced. Essentially, there are three civil remedies: (1) suits by covered employees to recover unpaid minimum wages or overtime compensation, 29 U.S.C. 216(b); (2) suits by the Secretary of Labor [17] to recover the amount of employee claims for such unpaid sums where no unsettled issue of law is in-

[17] Under Reorganization Plan No. 6 of 1950, 64 Stat. 1263, the Secretary succeeded to the functions of all other officers, agencies and employees in the Department.

volved, 29 U.S.C. 216(c); (3) injunctive actions by the Secretary of Labor to restrain violations of the Act, including the restraint of the withholding of sums due employees, 29 U.S.C. 217, see 29 U.S.C. 211(a).

Significantly, the appellants' Eleventh Amendment argument totally ignores the injunctive remedy available to the Secretary of Labor under Section 217. The appellants make no claim here, and made none below, that the Eleventh Amendment bars a suit by the Secretary seeking to enjoin non-compliance with the Act. The courts have recognized that the Secretary brings such actions "not in his individual, but in his official capacity. The suit [is] for the benefit of the United States * * *. It is perfectly clear, therefore, that it [is] in effect a suit by the United States." *Walling* v. *Norfolk Southern Ry. Co.*, 162 F. 2d 95, 96 (C.A. 4). Other courts have pointed out that the Secretary in such suits "properly and exclusively represents the public interest," *McComb* v. *Frank Scerbo & Sons*, 177 F. 2d 137, 138 (C.A. 2), and that his purpose in seeking to restrain the withholding of wages due "is not to collect a debt owed by an employer to his employee but to correct a continuing offense against the public interest," *Wirtz* v. *Jones*, 340 F. 2d 901, 904 (C.A. 5). Section 217 suits by the Secretary are then, in effect, suits by the United States, and there is, of course, no Eleventh Amendment or sovereign immunity bar to such suits. *United States* v. *Texas*, 143 U.S. 621; *United States* v. *California*, 297 U.S. 175.

Thus the Fair Labor Standards Act may be enforced against the States through the medium of Section 217 actions. Section 216(c) actions by the Secretary are in much the same posture. The courts have regularly recognized that in Section 216(c) actions, as well as those under Section 217, the government's interest is not merely derivative from that of the employee, and its standing is not the same as that of the employee. See *Wirtz* v. *C & P Shoe Corp.*, 336 F. 2d 21, 30 (C.A. 5); *Mitchell* v. *Richey,* 164 F. Supp. 419, 420 (W.D.S.C.); *Mitchell* v. *Floyd Pappin & Son,* 122 F. Supp. 755, 756–758 (D. Mont.); *Tobin* v. *Wilson,* 98 F. Supp. 131, 134 (N.D. Ill,).

In short, even if the Eleventh Amendment were held to bar employee suits against the States, the Act could be enforced through the remaining provisions, especially in view of the Act's separability provision, 29 U.S.C. 219.[18]

2. Appellants' remaining contention that the hospitals and schools are not within the coverage of the act because their employees do not "handle goods for resale" is both factually and legally without support.

The Act applies to all employees of "an enterprise engaged in commerce or in the production of goods for commerce," 29 U.S.C. (1964 ed., Supp. II) 206(b), 207(a)(2), which, insofar as relevant here, is defined as an enterprise "which has employees engaged in

[18] The question of the validity of employee actions under Section 216(b) should not be considered at this time, but should await an attempt by a State employee to sue his employer. At that time, the question whether, under *Parden* v. *Terminal R. Co.*, 377 U.S. 184, the appellants will be deemed to have consented to employee suits may be fully examined. See the opinion of Judge Winter, below, 269 F. Supp. at 831, App. 8a, n. 12.

commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person * * *." 29 U.S.C. (1964 ed., Supp. II) 203(s).

Drawing on the fact that the term "goods" is defined in the Act to exclude goods in the possession of the ultimate consumer, appellants allege that the schools and hospitals are ultimate consumers of the supplies which they receive, so that the employees of these institutions cannot be said to handle or work on "goods" in commerce. They contend, therefore, that none of the employees of these institutions come within the coverage of the act. There are two answers to this argument.

First, it is obvious that the covered institutions are not the ultimate consumers of all the goods they purchase, particularly food and drugs. Second and more important, even if the institutions are the ultimate consumers of all such goods so that they would not have any "employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person" they do have "employees engaged in commerce or in the production of goods for commerce." Regardless of the limitation on the definition of "goods,"[19] the employees receiving purchases shipped interstate are "engaged in com-

[19] In addition, that limitation on the definition of goods does not apply to an ultimate consumer who is a "producer" of the goods. 29 U.S.C. 203(i). For the purposes of the Act, "produced" means "produced, manufactured, mined, handled, or in any other manner worked on," while "an employee shall be deemed to have engaged in the production of goods if such em-

merce".[20] In addition, employees engaged in the ordering of such purchases and in other interstate communications are "engaged in commerce or in the production of goods for commerce."[21]

Thus, the assertion made by appellants on page 81 of their brief that "In order to assert coverage successfully, appellees must show that the public schools and hospitals have employees who handle goods which are for resale (or of which their employer is not the ultimate consumer) and which were produced for or have moved in commerce" is totally without founda-

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ployee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation essential to the production thereof." 29 U.S.C. 203(j). Thus, even if the public institutions "consume" all their purchases, they would nonetheless be "producers" of the goods if they were handled or worked on, the limitation on the definition of "goods" would be inapplicable, and the requirements for enterprise coverage would be met in an additional manner.

[20] See *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *McComb* v. *Herlihy*, 161 F. 2d 568 (C.A. 4); *Sucrs. de A. Mayol & Co.* v. *Mitchell*, 280 F. 2d 477 (C.A. 1), certiorari denied, 364 U.S. 902 *Mitchell* v. *Sunshine Department Stores, Inc.*, 292 F. 2d 645 (C.A. 5).

[21] The Act's definition of "goods" applies to "ideas, wishes, orders and intelligence," *Western Union* v. *Lenroot*, 323 U.S. 490, 502–503. The preparation of written documents and other materials for out-of-state transmission, as well as the actual interstate transmission of funds, documents and other communications, are all activities in commerce, on the basis of which individual employees have regularly been held to come within the Act's original coverage provisions. See, *e.g.*, *Public Building Authority of Birmingham* v. *Goldberg*, 298 F. 2d 367 (C.A. 5) *Beneficial Finance Co.* v. *Wirtz*, 346 F. 2d 340 (C.A. 7); *Willmark Service System* v. *Wirtz*, 317 F. 2d 486 (C.A. 8), certiorari denied, 375 U.S. 897; *Aetna Finance Co.* v. *Mitchell*, 247 F. 2d 190 (C.A. 1); *Mitchell* v. *Kroger Company*, 248 F. 2d 935 (C.A. 8).

tion in the Act. Although that showing might well be made, it is not a necessary one, for employees may be "engaged in commerce", or in the "production of goods for commerce" in the absence of that showing. The plain language of the Act thus calls for rejection of the argument of the appellants on this point.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Constitution of the United States provides in pertinent part:

> Article I, Section 8:
>
> The Congress shall have Power * * *;
>
> To regulate Commerce * * * among the several States * * *;
>
> * * * * *
>
> Article VI
>
> * * * * *
>
> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.
>
> * * * * *
>
> Amendment X:
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
>
> Amendment XI:
>
> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. The Fair Labor Standards Act of 1938, as amended, provides in pertinent part (Title 29, United States Code, 1964 ed. and Supp. II):

> § 201. Short title.
>
> This chapter may be cited as the "Fair Labor Standards Act of 1938".

§ 202. Congressional finding and declaration of policy.

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

§ 203. Definitions.

As used in this chapter—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not

include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence), or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * * * *

(q) "Secretary" means the Secretary of Labor.

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more

corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor * * *. For purposes of this subsection, the activities performed by any person or persons—

(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit),

shall be deemed to be activities performed for a business purpose.

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level

which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);

(2) is engaged in laundering, cleaning, or repairing clothing or fabrics;

(3) is engaged in the business of construction or reconstruction, or both; or

(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

* * * * *

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

* * * * *

§ 206. Minimum wage.

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $1.40 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966 and not less than $1.60 an hour thereafter, except as otherwise provided in this section;

* * * * *

(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, wages at the following rates:

(1) not less than $1 an hour during the first year from the effective date of such amendments,

(2) not less than $1.15 an hour during the second year from such date,

(3) not less than $1.30 an hour during the third year from such date,

(4) not less than $1.45 an hour during the fourth year from such date, and

(5) not less than $1.60 an hour thereafter.

* * * * *

§ 207. Maximum hours.

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of

the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966.

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

(j) No employer engaged in the operation of a hospital shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at

a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

§ 211. Investigations, inspections, records, and homework regulations.

(a) * * * Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

* * * * *

§ 213. Exemptions.

(a) The provisions of sections 206 and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) * * *

* * * * *

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title * * *

* * * * *

(b) The provisions of section 207 of this title shall not apply with respect to—

* * * * *

(8) any employee * * * who (A) is employed by an establishment which is an institution (other than a hospital) primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises, and (B) receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed * * *

* * * * *

§ 215. Prohibited acts; prima facie evidence.

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207 of this title * * * except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful.

(2) to violate any of the provisions of section 206 or section 207 of this title * * *

* * * * *

§ 216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision.

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected

in the amount of their unpaid minimum wages or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

(c) The Secretary of Labor is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. When a written request is filed

by any employee with the Secretary of Labor claiming unpaid minimum wages or unpaid overtime compensation under section 206 or 207 of this title, the Secretary of Labor may bring an action in any court of competent jurisdiction to recover the amount of such claim: *Provided,* That this authority to sue shall not be used by the Secretary of Labor in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary of Labor if it does involve any issue of law not so finally settled. The consent of any employee to the bringing of any such action by the Secretary of Labor, unless such action is dismissed without prejudice on motion of the Secretary of Labor, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the sub-

sequent date on which his name is added as a party plaintiff in such action.

* * * * *

§ 217. Injunction proceedings.

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title.

* * * * *

§ 219. Separability of provisions.

If any provision of this chapter or the application of such provision to any person or circumstances is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

U.S. GOVERNMENT PRINTING OFFICE: 1966

MAR 2 9 1968 SUPREME COURT, U. S.

NO. 742

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF MARYLAND, ET AL.,
Appellants

v.

W. WILLARD WIRTZ,
SECRETARY OF LABOR, ET AL.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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INDEX

Page

MOTION: iii

Interest of the AFL-CIO iv

The Issue To Be Covered In The AFL-CIO's Brief *Amicus* iv

Conclusion v

BRIEF: 1

Argument

Prior Decisions of This Court Demonstrate Beyond Question That The 1966 Amendments To The Fair Labor Standards Act Are Constitutional 2

Conclusion 15

CITATIONS

CASES:

Butte Medical Properties, 168 NLRB No. 52 (1967) 5

California v. *Taylor,* 353 U.S. 553 (1957) 8, 12, 14

California v. *United States,* 320 U.S. 577 (1944) 8

Cramp v. *Board of Instruction,* 368 U.S. 278 (1961) 13

Case v. *Bowles,* 327 U.S. 92 (1946) 9-10, 12, 13

NLRB v. *Central Dispensary & Emergency Hospital,* 145 F2d, 852 (D.C. Cir. 1944) 5

NLRB v. *Fainblatt,* 306 U.S. 601 ~~*cert. denied* 324 U.S. 847 (1939)~~ 4

NLRB v. *Inglewood Park Cemetery Association,* 355 F2d 448 (9th Cir., 1966) *cert. denied* 384 U.S. 951 5

NLRB v. *Jones & Laughlin,* 301 U.S. 1 (1937) 3-4

Page

NLRB v. *Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963) 4

NLRB v. *Stoller*, 207 F2d 305 (9th Cir., 1953) 5

Oklahoma v. *Atkinson Co.*, 313 U.S. 508 (1941) 8

Oklahoma v. *United States Civil Service Commission*, 330 U.S. 127 (1947) 9, 10-11, 14

Polish National Alliance v. *NLRB*, 322 U.S. 643 (1944) 4

United States v. *California*, 297 U.S. 175 (1936) .. 6-7, 12

United States v. *Carolene Products Co.*, 304 U.S. 144 (1938) 3

United States v. *Darby*, 312 U.S. 100 (1941) 2, 4

United States v. *Ohio*, 385 U.S. 9 (1966) *reversing per curiam* 354 F2d 549 (6th Cir. 1965) 8

United States v. *Riccardi*, 357 F2d 96 (2nd Cir., 1966) cert. denied 384 U.S. 942 4

Wickard v. *Filburn*, 317 U.S. 111 (1942) 3

Wieman v. *Updegraff*, 344 U.S. 183 (1952) 13

STATUTES:

Fair Labor Standards Act (Public Law 89-601, 80 Stat. 830, amending 29 USC 201 *et seq.*) ..... iv, 2

MISCELLANEOUS:

Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91 (1966) 3

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief *amicus* in the instant case in support of the position of the Appellees, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the Appellees has been obtained. Consent of counsel for the State of Maryland, the State which brought this action and which has taken the lead in prosecuting it, and the State of Texas, the only State to file a separate brief of its own, has been sought. The State of Maryland has stated that it would not "actively oppose" the filing of a brief *amicus* by the AFL-CIO, but that it could not "consent" to

the filing of said brief without "consulting all of the other states [which] would present a time consuming problem." The State of Texas has given its consent.

INTEREST OF THE AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations is a federation of 129 affiliated labor organizations with a total membership of approximately 14,000,000. The question presented here is whether that portion of the 1966 amendments to the Fair Labor Standards Act (Public Law 89-601, 80 Stat. 830, amending 29 USC 201 *et seq.*) which extends the benefits of that Act to certain employees of public schools and hospitals and similar institutions, is constitutional. Affiliates of the AFL-CIO represent a substantial number of employees affected by these amendments and the AFL-CIO was active in seeking to persuade the Congress to enact this broadened coverage. Indeed, as AFL-CIO President George Meany has stated, the Federation regards the 1966 amendments to the Act as "the greatest single victory in the war on poverty" and has set up machinery for a nationwide drive to secure their effective enforcement. In light of the above, we submit that the interest of the Federation in the outcome of this case is manifest.

THE ISSUE TO BE COVERED IN THE AFL-CIO'S BRIEF AMICUS

In the court below, the main burden of the Government's brief was that Congress has power under the Commerce Clause to pass a broad variety of legislation which has an effect on state activities. Given the varied interests of the United States, this is the natural position for the Government to take and it is our understanding that its brief to this Court will follow the same pattern. The AFL-CIO's

primary interest on the other hand is Congress's power to pass laws which affect the employment relation between the several States and their employees. And the accompanying brief, therefore, is addressed to this narrower concern. We believe that this approach puts the instant case in a somewhat different focus and that it would, therefore, be helpful to the Court to have the benefit of the Federation's views.

CONCLUSION

For the above-stated reasons, we respectfully urge the Court to grant this motion to file the accompanying brief *amicus* in the instant case in support of the position of the Appellees.

Respectfully submitted,

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March 1968

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae*.

The opinion below, jurisdiction, questions presented, and the constitutional and statutory provisions involved, are set out in the Appellees' brief.

The interest of the AFL-CIO is set out on p. iv of the foregoing motion for leave to file a brief as *amicus curiae*.

ARGUMENT

PRIOR DECISIONS OF THIS COURT DEMONSTRATE BEYOND QUESTION THAT THE 1966 AMENDMENTS TO THE FAIR LABOR STANDARDS ACT ARE CONSTITUTIONAL

The 1966 amendments to the Fair Labor Standards Act (Public Law 89-601, 80 Stat. 830 amending 29 U.S.C. 201 *et seq.*) extend the benefits of that Act to employees, who are not executives, administrators or professionals, of any:

> "... enterprise which has employees engaged in commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which . . . is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit)."

1. The declaration of policy in the Act establishes that one of the Congressional purposes in regulating labor relations to the extent of establishing minimum wages and hours was to prevent burdens and obstructions to commerce.[1] And *United States* v. *Darby*, 312 U.S. 100, 120 (1941), upholding the constitutionality of the Act, holds that this

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[1] "The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such

Congressional response to the problem of substandard working conditions is reasonably related to the end sought and, therefore, satisfies the first demand of the Commerce and Necessary and Proper clauses. *Cf. Wickard* v. *Filburn*, 317 U.S. 111, 129 (1942), *see also United States* v. *Carolene Products Co.* 304 U.S. 144, 152-154 (1938); Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 104-105 (1966).

Moreover, it is perfectly well settled that, under the commerce clause, Congress may, in order to insure the smooth and uninterrupted flow of goods in interstate commerce, regulate the labor relations of any employer whose activities depend, to any degree greater than *de minimis*, on goods which have moved across state lines and whose situation is representative of a significant group or class. As Chief Justice Hughes, speaking for this Court in *N.L.R.B.* v. *Jones & Laughlin*, 301 U.S. 1, 36-37 (1937), stated in upholding the constitutionality of the National Labor Relations Act:

> "The Congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental princi-

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labor conditions among the workers of the several states; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

> ple is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement'; to adopt measures 'to promote its growth and insure its safety'; 'to foster, protect, control and restrain.' That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." (Citations omitted.)

And as the Court added in *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 648 (1944):

> "Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce."

See also NLRB v. Fainblatt, 306 U.S. 601, 606 (1939).

While the leading cases, such as *Darby* and *Jones & Laughlin*, which established Congressional authority over labor relations of so-called "intra-state" or "local" employers, dealt with manufacturers, there can be no doubt that the principles they establish apply to retailers and those whose primary function is to supply services to the public whether on a profit or nonprofit basis. *See NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963) (fuel oil retailer); *United States* v. *Riccardi*, 357 F2d 96 (2nd Cir. 1966) *cert. denied* 384 U.S. 942 (apartment house superin-

tendent); *NLRB* v. *Inglewood Park Cemetery Association* 355 F2d 448 (9th Cir. 1966) *cert. denied* 384 U.S. 951 (cemetery); *N.L.R.B. v. Stoller,* 207 F2d 305 (9th Cir., 1953) (dry cleaning establishment); *Butte Medical Properties d/b/a Medical Center Hospital,* 168 NLRB No. 52 (1967); *N.L.R.B.* v. *Central Dispensary & Emergency Hospital,* 145 F2d 852 (D.C. Cir. 1944) *cert. denied* 324 U.S. 847.[2] In light of these cases the fact that the employers here operate schools and hospitals places their relationship with their employees within the reach of a Congressional regulation, such as that challenged here, which is reasonably related to the prevention of burdens or obstructions to commerce between the states.

Certainly both logic and practical considerations support this conclusion, for labor strife at an enterprise receiving interstate goods can damage the public, and particularly those who make and move those goods, just as strife at a manufacturing plant can injure those who move or utilize

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[2] In *Central Dispensary & Emergency Hospital,* the Court of Appeals stated (145 F2d at 853):

> "Respondent's activities involve the sale of medical services and supplies for which it receives about $600,000 a year. It purchases from commercial houses material of the value of about $240,000 annually. It employs about 230 persons for nonprofessional services and maintenance work and 120 technical and professional employees. Such activities are trade and commerce and the fact that they are carried on by a charitable hospital is immaterial to a decision of this issue. In the case of *American Medical Association* v. *United States,* [130 F2d 233] this Court held that the sale of medical and hospital services for a fee has been considered as trade by English and American common law cases going back to 1793. In *Jordan* v. *Tashiro* [278 U.S. 123], the operation of a general hospital was said to be a 'business undertaking' and such activity was included within the meaning of the words trade and commerce as used in a treaty with Japan."

them. This point is reinforced by appreciation of the fact that public educational institutions will spend approximately 38 billion dollars in fiscal 1966-67 and public hospitals approximately 4 billion dollars (App. 11a). Much of this money will be spent for specialized goods—textbooks, teaching machines, desks, hospital beds, surgical equipment, etc. —which are not produced in every State. Thus, in effect, there are in this country large, interconnected health and education industries spanning state lines with the hospitals and schools as their focal points. In light of the size, importance and complexity of these industries, it is clear that the Commerce Clause must have the same scope when applied to them as it has been held to have when applied to other less pervasive and important industries.

2. The decisions of this Court establish that state actions, as well as private actions sanctioned by state law, which burden or obstruct interstate commerce may be regulated by Congress under the Commerce Clause. Indeed, in our review of the cases we have been unable to find even a single intimation by this Court which suggests that state activities may not be governed by an otherwise valid Congressional enactment under that clause. The leading case is *United States* v. *California*, 297 U.S. 175 (1936) which applied the Safety Appliance Act to railroads operated by the State. Justice Stone, as he then was, speaking for a unanimous Court, stated (297 U.S. at 183-185):

> "The state urges that it is not subject to the federal Safety Appliance Act. It is not denied that the omission charged would be a violation if by a privately-owned rail carrier in interstate commerce. But it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement, is engaged in performing a public function in its sovereign capacity and for that

reason cannot constitutionally be subjected to the provisions of the federal Act.

"Despite reliance upon the point both by the government and the state, we think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution."

• • • •

"The federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances and to safeguard interstate commerce itself from obstruction and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual use is wholly intrastate. The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute." (Citations omitted.)

This language may easily and justly be put in terms applicable here, for it is entirely accurate to say that the Fair Labor Standards Act is remedial, that its purpose is to safeguard interstate commerce from disruption caused by substandard working conditions, and that this objective may be

subverted when the conditions occur in either a publicly-owned or a privately-owned school or hospital,

Subsequently, as we have just noted, there has been an unbroken line of decisions consistently applying these principles. *See e.g. California* v. *Taylor,* 353 U.S. 553 (1957); *California* v. *United States,* 320 U.S. 577 (1944); *Oklahoma* v. *Atkinson Co.,* 313 U.S. 508 (1941); *United States* v. *Ohio,* 385 U.S. 9 (1966), *reversing per curiam* 354 F2d 549 (6th Cir. 1965). Indeed, it is difficult to conceive of a case more clearly in point than *California* v. *Taylor,* which applied the Railway Labor Act to a state operated railroad thereby displacing state civil service regulations. In that case, the Court stated in a unanimous opinion (353 U.S. at 568):

> "Finally, the State suggests that Congress has no constitutional power to interfere with the 'sovereign right' of a State to control its employment relationships on a state-owned railroad engaged in interstate commerce. In United States v. California (US) supra, this Court said that the State, although acting in its sovereign capacity in operating this Belt Railroad, necessarily so acted 'in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government.'
>
> • • • • •
>
> "That principle is no less applicable here. If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships."

The discussion thus far establishes that there is no implicit limitation inherent in the Commerce Clause itself which would bar the application of the Act to public schools and hospitals. It is equally plain that the decisions of this Court

demonstrate that the Tenth Amendment is of no avail to the Appellants here. In addition to the cases already noted, pp. 6-8 *supra*, the two authorities most squarely in point are *Case* v. *Bowles*, 327 U.S. 92 (1946) and *Oklahoma* v. *United States Civil Service Commission*, 330 U.S. 127 (1947). *Case* v. *Bowles* is a decision upholding the application of the Emergency Price Control Act, enacted pursuant to the War Power Clause, to sales by the State of Washington of timber grown on state land; the proceeds of said sales to go for the support of the public schools. In rejecting the state's Tenth Amendment argument, the Court stated (327 U.S. at 101-102):

> "The contention rests on the premise that there is a 'doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.' It is not contended, and could not be under our prior decisions, that the ceiling price fixed by the Administrator is Constitutionally invalid as applied to privately owned timber. But it is argued that the Act cannot be applied to this sale because it was 'for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens.' Since the Emergency Price Control Act has been sustained as a Congressional exercise of the war power, the petitioner's argument is that the extent of that power as applied to state functions depends on whether these are 'essential' to the state government. The use of the same criterion in measuring the Constitutional power of Congress to tax has proved to be unworkable, and we reject it as a guide in the field here involved.
>
> * * * * *
>
> "Our only question is whether the state's power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry on war. For reasons to which we have already adverted, an absence of federal power to fix maximum prices for

state sales or to control rents charged by a state might result in depriving Congress of ability effectively to prevent the evil of inflation at which the Act was aimed. The result would be that the Constitutional grant of the power to make war would be inadequate to accomplish its full purpose of the federal government's establishment.

"To construe the Constitution as preventing this would be to read it as a self-defeating charter. It has never been so interpreted. Since the decision in M'Culloch v. Maryland, 4 Wheat (US) 316, 420, it has seldom if ever been doubted that Congress has power in order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution. And we have said, that the Tenth Amendment 'does not operate as a limitation upon the powers, express or implied, delegated to the National Government.'" (Citations omitted.)

In *Oklahoma* v. *Civil Service Commission,* the State challenged a determination by the Civil Service Commission made pursuant to Section 12(a) of the Hatch Act.[3] Section 12(a) provided, in essence that "no officer . . . of any State . . . agency whose principal employment is in connection with any activity which is financed in whole or in part by loan or grants made by the United States . . . shall . . . take any active part in political management or political campaigns." Section 12(b) provided that if the Commission after hearing determined that a violation of Section 12(a) had occurred, it might determine that the violation is such that it "warrants the removal of the officer" and provided further that "if the officer . . . has not been removed from his office . . . within thirty days after notice of [such] determination . . . the Commission . . .

[3] The present version of Section 12(a) is to be found at 5 U.S.C. §1502.

shall make . . . an order requiring [the withholding] from its loans or grants . . . [of] an amount equal to two years' compensation at the rate such officer . . . was receiving at the time of such violation." After a hearing, the Commission determined that an Oklahoma Highway Commissioner had violated Section 12(a) and that the violation warranted his removal. The State instituted review proceedings in the Federal Courts, and those proceedings ended in a determination by this Court upholding the Commission's action and rejecting the State's Tenth Amendment claim (330 U.S. at 142, 143):

> "Petitioner's chief reliance for its contention that §12(a) of the Hatch Act is unconstitutional as applied to Oklahoma in this proceeding is that the so-called penalty provisions invade the sovereignty of a state in such a way as to violate the Tenth Amendment by providing for 'possible forfeiture of state office or alternative penalties against the state.'
>
> • • • •
>
> "While the United States is not concerned and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to state shall be disbursed.
>
> "The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case. As pointed out in United States v. Darby, 321 U.S. 100, 124, the Tenth Amendment has been consistently construed 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.' The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid."

We submit that the cases just cited demonstrate that the concept of federalism set out in the Constitution provides for the resolution of the occasional clash of sovereignties which is inherent in a federal system by subordinating *all* state enactments, which are inconsistent and incompatible with a federal enactment passed by Congress, pursuant to a plenary authority granted to it, to the paramount federal law. This conclusion is the only one which gives proper scope to the Supremacy Clause. The Appellants here, nevertheless, argue (Appellants' Br. 24, 46-56) that state legislation governing the employment relationship between the State and those whom it employs to render "nonprofit," "purely governmental" and "economically marginal" services is not subject to the full force of the Supremacy and Commerce Clauses. This argument is untenable.

The necessary implication of the Appellants' argument is that our constitutional system recognizes two forms of state sovereignty, which are different in kind. The first is a form which is manifested in enactments governing the State's private citizens and state activities which are not "essentially governmental." This form of sovereignty Appellants' concede to be subject to displacement by superior federal law. The second, and "higher," form of sovereignty includes state laws regulating matters which are "essentially governmental" and despite the Supremacy Clause the Appellants' claim that such laws are not subject to otherwise plenary federal authority. The primary difficulty with this position is that it finds no support in the provisions of the Constitution. Plainly, under *Case* v. *Bowles* and *Oklahoma* v. *Civil Service Commission,* this argument cannot be based on the Tenth Amendment. It is just as plain that given the decision in *United States* v. *California* and *California* v. *Taylor,* there can be no doubt that this Court has rejected the notion there are limita-

tions on the plenary powers of Congress which are implicit in the general concepts of federalism. Equally there can be no doubt that this Court's decisions in cases such as *Cramp* v. *Board of Instruction*, 368 U.S. 278 (1961) and *Weiman* v. *Updegraff* 344 U.S. 183 (1952) have put to rest the belief that the States have a complete and unfettered discretion in dealing with their employees, which is not subject to the overriding authority of the Constitution.

Moreover, we submit that Appellants' argument that laws which set wages for state blue collar employees employed in hospitals and schools are of a higher order of importance than state laws setting a minimum wage for employees of private enterprises within its jurisdiction runs counter to practical experience. For the latter may well embody a solution to a local problem every bit as profound as the economical management of a state-run enterprise. For example, in the absence of federal legislation, a particular state may choose a minimum wage law providing for only 75 cents an hour, when other states have set a higher figure, as a potent mechanism for attracting industry and thereby increasing the public good. But after Congress enters the field such a law would have no force or effect no matter what prompted it.

The Appellants' position suffers from at least two other critical defects as well. The first is that there is simply no support for the contention (Appellants' Br. 28-29) that application of the Act would strike "at the heart of state government." The effect of the Act here is exactly the same as the impact of the legislation upheld in *Case* v. *Bowles* on the State's educational establishment. Both enactments require the affected State to raise more money from taxes or other sources to finance educational services. And turning from the effect of the Act to the focus of the federal concern which prompted it, there can be no doubt that this

enactment is far less intrusive on the mechanics of state government than were the statutes upheld in *California* v. *Taylor* and *Oklahoma* v. *Civil Service Commission*. For here, Congress has dealt only with the cash nexus between employer and employee while the former completely displaced the State's civil service law and the latter placed limitations on the free exercise of political activity by state officials. Equally unproven is Appellants' contention (Appellants' Br. 34-38, 67-68) that the validation of the Act would remove all limitations on the commerce power and necessarily lead to the conclusion that Congress can set the wages and working conditions of state judges, executives and legislators. It is true that inherent in our position is the proposition that there is no bright line indicating the exact limits of Congress's commerce powers. This, however, does not mean that our position leads ineluctably to the conclusion that these powers are unlimited. For we believe that there are limitations on Congress inherent in the Commerce and Necessary and Proper Clauses. Those limitations cannot, however, be divined through abstract formulations, rather they must be developed through a process of litigating elucidation which looks to practical realities. And when this procedure is followed the validity of the Act here is apparent. For, as this Court has recognized, it is perfectly rational for Congress to have determined that failure to ameliorate the harsh working conditions of certain blue collar employees who work for the States or their local subdivisions might well lead to work stoppages which would tend to obstruct the free flow of interstate commerce. The fact that this is so does not mean that the same argument would necessarily provide a rational predicate for similar regulations covering high state officials. That is a question for the future, and the resolution of this case in favor of the Government would

not, we submit, be controlling when it arises, it ■ should ever arise.

CONCLUSION

The structure of this brief has been dictated by our firm belief that this case does nothing more than raise issues which have been set to rest by the decisions of this Court in cases which cannot rationally be distinguished from the situation presented here. We submit that the foregoing argument substantiates our view and that on the basis of the precedents we cite, this Court should decide in favor of the Government.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 742

STATE OF MARYLAND, ET AL., *Appellants,*

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, ET AL., *Appellees.*

Appeal From the United States District Court for the District of Maryland

MOTION OF AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, FOR LEAVE TO FILE AMICUS CURIAE BRIEF and BRIEF OF SAID FEDERATION AS AMICUS CURIAE URGING AFFIRMANCE

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INDEX

	Page
Motion for Leave to File Amicus Curiae Brief	1
Brief of Amicus Curiae Urging Affirmance	5
Introduction	5
Argument	6
Conclusion	16

AUTHORITIES CITED

CASES:

Board of Trustees v. United States, 289 U.S. 48	12
California v. United States, 320 U.S. 577	12
Case v. Bowles, 327 U.S. 92	12
City of Takoma v. Taxpayers, 357 U.S. 320	12
County Board v. Griffin, 204 Va. 650	14
Griffin v. School Board, 377 U.S. 218	14
Katzenbach v. McClung, 379 U.S. 294	11
Labor Board v. Reliance Fuel, 371 U.S. 224	11
Maryland v. Wirtz, 269 F. Supp. 826	8, 15
National Labor Relations Board v. Central Dispensary & Emergency Hospital, 145 F. 2d 852 (C.A. D.C. 1945), certiorari denied, 324 U.S. 847	11
Oklahoma v. Atkinson, 313 U.S. 508	15
Parden v. Terminal Railroad Co., 377 U.S. 184	12
Powell v. United States Cartridge Co., 339 U.S. 497	7
United States v. California, 297 U.S. 175	12
United States v. Carolene Products Co., 304 U.S. 144	7
United States v. Darby, 312 U.S. 100	7
United States v. Ohio, 385 U.S. 9	14
Wickard v. Filburn, 317 U.S. 111	7, 11

MISCELLANEOUS:

	Page
Bureau of Labor Statistics, July 1967, Work stoppages involving government employees, 1966	10
Columbus Dispatch, November 27, 1967	10
Conference Report No. 2004, September 6, 1966, 2 U.S.C. Congressional and Administrative News (89th Congress, Second Session) p. 3047	9
112 Congressional Record (May 25, 1966), p. 10820	9
Dayton Journal Herald, November 9, 1967	10
H. Rep. No. 1366, 89th Congress, Second Session	8
History of Education, 7 Encyclopedia Britannica, p. 980 (1955 ed.)	13
Kenosha News, September 23, 1966 (Milwaukee County Hospital)	10
Milwaukee Journal, June 16, 1966	10
Milwaukee Sentinel, December 21, 1967	10
New Haven Register, December 1, 1967	10
New York Times, October 6, 1967	10
Palo Alto Times, September 12, 1966 (Richmond, California School District)	10
Pontiac Press, December 6, 1967	10
Time Magazine, March 1, 1968, pp. 34, 35	10

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MOTION OF AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The American Federation of State, County, and Municipal Employees, AFL-CIO, respectfully moves for leave to file the accompanying brief *amicus curiae* in this case. Request for the consent of the Appellants to the filing of this brief was made but was

not answered. In the District Court proceedings, the Federation by court order was allowed to file a brief as *amicus curiae.*

In support of this motion, the Federation states as follows:

1. The Federation is a labor organization representing public employees and others for collective bargaining and other mutual aid and protection. It presently has approximately 311,000 members throughout the United States. It has a total of 1,726 locals, in 44 states, the District of Columbia, Puerto Rico and the Canal Zone.

2. At the present time the Federation has approximately 37,640 members employed in schools by state and local governments and approximately 73,288 employees in hospitals, mental institutions, and nursing homes operated by state and local governments. The Federation plans and expects to admit to membership in the future substantial additional employees in these categories.

3. The Federation has chartered fifteen local unions in the State of Maryland affected by the recent amendments to the Fair Labor Standards Act and is presently organizing two more locals. It presently has approximately 1,724 members employed in schools operated by state and local governments in Maryland and approximately 1,959 members in Maryland who are employed by the state and local governments in hospitals, mental institutions, and nursing homes.

4. The employment conditions of the Federation's members employed by state and local governments and schools and hospitals are directly and materially affected by the provisions of the Fair Labor Standards

Act (29 U.S.C. § 201 et seq.; 52 *Stat.* 1060, as amended) particularly as amended by Public Law 89-601 (80 *Stat.* 830) which is the subject of this suit. The amendments extend overtime and minimum wage guarantees to these employees. The purpose and effect of these provisions is to ameliorate the working conditions of such employees, including those who are members of the Federation, and the Federation played a significant role in securing the enactment of these provisions.

5. A judgment declaring the provisions to be unconstitutional would deprive the Federation and its members of the benefits of that law.

For these various reasons, the motion for leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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IN THE

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STATE OF MARYLAND, ET AL., *Appellants*,

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, ET AL., *Appellees*.

Appeal From the United States District Court for the District of Maryland

BRIEF OF AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, AS AMICUS CURIAE URGING AFFIRMANCE

INTRODUCTION

The American Federation of State, County, and Municipal Employees is a labor organization representing public employees and others for collective bargaining and other mutual aid and protection. Over 100,000 members of the Federation are directly and materially

affected by the challenged amendments to the Fair Labor Standards Act. For these reasons, the Court below granted the Federation leave to file a brief as *amicus curiae.*

We fully subscribe to the views expressed in the opinion of Judge Winter and in the Brief of the United States to this Court. We wish to emphasize, however, that this case ultimately involves the right of some 1.4 million public employees to enjoy the modest protection that Congress has afforded them. Appellants' elaborate arguments concerning state sovereignty, cannot obscure the real effort to avoid the obligation to pay a $1.00 per hour minimum wage and time and one-half for overtime to a limited group of underpaid workers. Congress was aware, though Appellants apparently are not, that these public employees are entitled to protection similar to their counterparts in private industry and that the public employee is fully to entitled to fair treatment from his employer.

ARGUMENT

The extension of the Fair Labor Standards Act to the employees of schools and hospitals is consistent with the purposes of the Act as originally passed and, like the original Act, is clearly within the Constitutional power of Congress to regulate commerce. Appellants argue that the findings of Congress as to the need for these amendments and of the effect on commerce of the regulated activities are inadequately articulated and unsupported by evidence. Brief of Appellants, pp. 16-27. The adequacy of the evidence before Congress as to the effect of certain activities on commerce is of course not, as Appellants seem to think, reviewable by this Court in the same manner as

in a criminal case. See *United States* v. *Darby,* 312 U.S. 100, 120-121; *Wickard* v. *Filburn,* 317 U.S. 111, 129; *United States* v. *Caroline Products Co.,* 304 U.S. 144, 152-154. But, in any event, a review of the reasons stated by Congress demonstrates conclusively that it was relying upon considerations identical to those underlying the passage of the original act.

This Court has stated that the primary purpose of the Act was to eliminate substandard labor conditions throughout the nation as rapidly as practicable. *Powell* v. *U.S. Cartridge Co.,* 339 U.S. 497, 509-510. And that Congressional aim, among others, was expressly asserted in the Committee reports respecting the amendments now challenged. Congress, with restrained eloquence, set forth the need for these amendments in terms totally consistent with the aims this Court has previously declared appropriate to Congressional exercise of the power to regulate commerce:

> "... These enterprises which are not proprietary, that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose. Failure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which 'constitute an unfair method of competition in commerce.' Since Federal Government hospitals have wages at levels which are at or above the present minimum wage level, and the committee can be assured that such wage levels will not fall below the statutory minimum, the extension of coverage provided by this bill does not include the employees of such hospitals (except as provided in section 306 of the bill). Even outweighing the consideration of unfair competition between covered and noncovered enterprises were the needs of the employees of these enterprises.

> A custodial worker in an educational institution is as much in need of a minimum standard of living as a custodial worker in an aircraft plant. A transit worker has the same basic financial needs regardless of whether he works for a taxicab company or a local bus system. A food service employee faces the same cost-of-living problems whether employed by a hospital or a food service contractor. Neither employee should be compelled to subsidize the costs of these services to the consumer. Such institutions are compelled to purchase goods and contract services from employers who must pay the minimum wage. They cannot, in good conscience, deny their own employees this bare minimum. They continue to expand and construct new facilities at the prevailing market costs. They can pay their own employees wages necessary for the maintenance of the minimum standard of living." H.Rep. No. 1366, 89th Cong., 2d Sess.[1]

In attempting to buttress their claim that Congress did not adequately consider this legislation, Appellants incorrectly state that there was no debate in the House regarding the removal of the exemption for public schools. Brief of Appellants, p. 16. Judge Winter, for the Court below, set out in his opinion the extended discussion on this very question. *Maryland* v. *Wirtz,* 269 F. Supp. 826, 830, n. 10. Congressman Collier, the sponsor of the amendment, gave one particularly compelling example in support of the desirability of his amendment:

> "In a suburban area of one of our southern States, school officials were recently notified that

[1] As pointed out below, see p. 9, *infra,* the Committee recommended coverage of hospitals and institutions of higher learning but did not recommend coverage for elementary and secondary schools.

poverty funds were available to hire students who qualified under the poverty family income level at $1.25 per hour. What happened was this: The same school had working in the cafeteria women who had been employed for years—in fact, one was a widow—drawing 85 cents an hour for working in the school cafeteria. Yet, children were hand-picked and given $1.25 an hour to wash the blackboards in the same school.

"I do not believe there is anyone sitting in this House today who can justify this type of situation realizing, as we all must, that there will be under the poverty program a $1.25 hourly wage level. If not, then I would have grave reservation as to the depth of the sincerity such a Member would have in the principle of minimum wage." 112 Congressional Record (May 25, 1966), pp. 10820-10821.

Mr. Collier's amendment passed the House. In conference, the more comprehensive House bill was adopted. Conference Report No. 2004, September 6, 1966, 2 U.S.C. Congressional and Administrative News (89th Cong., Second Sess.) p. 3047. The notion that a bill that has gone to conference has in some way escaped Congressional scrutiny because one house acceded to the bill passed by the other is, of course, based on a total misconception of the legislative process.

Underlying the Fair Labor Standards Act is the Congressional finding that substandard working conditions lead to labor disputes burdening and obstructing commerce and the free flow of goods in commerce and interfere with the orderly and fair marketing of goods in commerce. 29 U.S.C.A. § 202. In extending the Act to the employees here involved, Congress was undoubtedly aware of the recent labor relations turmoil

among public employees. The past few years have seen a sharp and dramatic increase in the number of labor disputes involving public employees.[2] Many of the strikes that have resulted involved the very groups of employees covered by the amendments now under challenge.[3] There have been public employee strikes in which the question of premium pay for overtime work constituted a critical issue.[4] We are aware of at least two strikes involving members of our union during the very period Congress had this bill under active consideration.[5] Labor disputes disrupt commerce whether the striking workers are public employees or private employees. Congress could rightly conclude, as it did, that the flow of drugs and other interstate commodities used by a hospital or books used by a school is impeded by a labor dispute without regard to the governmental or non-governmental status of the employer.

Appellants concede that an extended teacher strike would lead to a situation in which interstate commerce would "feel the pinch". Brief of Appellants, p. 22. We cannot conceive that Congress is precluded from deciding that work stoppages by school custodial em-

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[2] *Work stoppages involving government employees*, 1966. Summary Release, United States Department of Labor, Bureau of Labor Statistics, July 1967. *Time Magazine*, March 1, 1968, p. 34, 35.

[3] *New York Times*, October 6, 1967; *Columbus Dispatch*, November 27, 1967; *Dayton Journal Herald*, November 9, 1967; *Milwaukee Sentinel*, December 21, 1967; *Milwaukee Journal*, June 16, 1966; *Pontiac Press*, December 6, 1967.

[4] *New Haven Register*, December 1, 1967.

[5] *Palo Alto Times*, September 12, 1966 (Richmond, California School District); *Kenosha News*, September 23, 1966 (Milwaukee County Hospital).

ployees are, in the same manner as teacher strikes, potentially disruptive of interstate commerce.

Appellants' attempts to distinguish the clear line of decisions by this Court supporting the constitutionality of the amendments are equally unpersuasive. Their arguments necessarily rest on the proposition that activities otherwise regulable by the Congress under the Commerce Clause are beyond Congressional power where undertaken by a state. It could not, of course, be seriously contended that the operations of private hospitals or private schools involving, as they do, significant quantities of interstate commodities are beyond the reach of Congressional authority under the Commerce Clause. The decisions of this Court make clear that the extension of coverage under the Fair Labor Standards Act to these private institutions is well within the ambit of Congressional power. See *Wickard* v. *Filburn, supra; Labor Board* v. *Reliance Fuel,* 371 U.S. 224; *Katzenbach* v. *McClung,* 379 U.S. 294. *Cf. N.L.R.B.* v. *Central Dispensary & Emergency Hospital,* 145 F. 2d 852 (C.A. D.C. 1945), cert. denied, 324 U.S. 847.

As Judge Winter correctly held, however, the argument that activities otherwise regulable under the Commerce Clause are immunized when performed by governmental bodies has been explicitly rejected by this Court on a number of occasions. As long ago as 1943, the point was so well established that this Court summarily rejected such a contention, holding that: "Finally, it is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade as the activities and instrumentalities which were here authorized to be regulated by the Commission, whether

they be the activities of private persons or public agencies." *California* v. *United States*, 320 U.S. 577, 586. Where the state engages in activities which, if private, are subject to regulation under the Commerce Clause, it is clearly subject to Congressional authority. *United States* v. *California*, 297 U.S. 175; *Parden* v. *Terminal Railroad Co.*, 377 U.S. 184; *City of Takoma* v. *Taxpayers*, 357 U.S. 320; *Board of Trustees* v. *United States*, 289 U.S. 48; *Case* v. *Bowles*, 327 U.S. 92.

Appellants attempt to escape the force of those precedents by arguing that the operations of public schools and hospitals are, in some unexplicated way, "especially unique" and for that reason, unlike the activities involved in the earlier cases, "do not constitute or engage in commerce. (sic)" Brief of Appellants, p. 8. But public bodies have no present or historical monopoly in the operations of schools and hospitals. At the present time, private institutions account for over 65 percent of the gross expenditures by nonfederal hospitals [6] and 21 percent of the gross expenditures by schools in the United States.[7]

The stipulated facts describing the relative proportion of public and non-public hospitals in Maryland are revealing. Of 74 nonfederal hospitals in Maryland, only 19 are operated by state or local governments.[8] Of a total of 44 institutions of higher learning, only 20 are publicly owned.[9] Of a total of 1655 schools, 508

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[6] Appellants' Appendix, p. 122a.

[7] Stipulation, Schools—United States. (The Appellants did not reproduce in their entirety the Stipulations below which are, however, a part of the record.)

[8] Appellants' Appendix, p. 116a.

[9] *Ibid.*, p. 113a; Stipulation, Maryland Schools.

are privately operated.[10] Nationally, less than half of all nonfederal hospitals are publicly operated and they account for some 22% of the total admissions.[11] Only 800 out of 2184 institutions of higher learning are public and close to 20% of all elementary and secondary schools are nonpublic.[12]

Appellants themselves refute the argument that these activities whose regulation they challenge are "unique." They contend that 84.3% of all children attending elementary and secondary schools in Maryland are in the public school system. Brief of Appellants, p. 19. Necessarily, therefore, they concede that 15.7% of the children attend non-public schools. Similarly, Appellants' contention that 91.6% of all mental patients in Maryland are confined in state hospitals concedes that the remainder are in non-public hospitals.[13] And, as we have previously shown, when all types of hospitals in Maryland are considered, only 15% of all admissions are by public hospitals. See p. 12, *supra*.

Historically, private operation of schools antedated public operation. Public education was essentially confined to New England until about 1850. History of Education, 7 Encyclopedia Britannica p. 980 (1955 ed.) ("In 1825, always excepting certain portions of New England, where the free school system had become thoroughly established, such schools were only the distant hope of statesmen and reformers . . . .") We would be the last to maintain that education is not an

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[10] *Ibid.*, p. 112a; Stipulation, Maryland Schools.

[11] Stipulation, Hospitals—United States, Attachment B.

[12] Stipulation, Schools—United States, Attachment B.

[13] Appellants argue that all tubercular patients in Maryland hospitals are in state hospitals. They do not and could not seriously argue that there are no private hospitals treating tubercular patients.

appropriate function for government but it is well to remember that a little more than a century ago the right of the state to tax for education was a fighting issue. Ibid. p. 981. Only four years ago, the Supreme Court of one of the appellant states held that each county in that state had "an option to operate or not operate public schools," and this Court accepted that decision as a definitive and authoritative holding of state law. *Griffin* v. *School Board,* 377 U.S. 218, 229-230,[14] citing *County Board* v. *Griffin,* 204 Va. 650, 113 S.E. 2d 565.[15] As regards hospitals and institutions of higher learning, the statistics cited above show that the majority remain private institutions.

In sum, state-owned hospitals and schools are no more "especially unique" than state-operated railroads, timber camps or farms, all of which this Court has held subject to regulation under the Commerce Clause, see p. 12, *supra.* Indeed, state operation of a penal farm, which this Court held subject to the Agricultural Adjustment Act, *United States* v. *Ohio,* 385 U.S. 9, is far more unique than the state operations involved in the instant case. The contention that the earlier precedents of this Court are inapplicable because the activities involved here are unique simply does not withstand analysis.

In apparent recognition of the fact that their supposed distinctions of the earlier decisions of this Court

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[14] In *Griffin,* this Court made clear that the closing of the schools in Prince Edward County was impermissible only since intended to discriminate on the basis of race. This Court's opinion clearly implied that cessation of state-operated schools for nondiscriminatory reasons would raise no constitutional difficulty.

[15] We find that "definitive and authoritative" holding somewhat inconsistent with Appellants' assertion that in Virginia the provision of a free school system is required by constitutional mandate. Brief of Appellants, p. 23, n. 3.

are analytically untenable, Appellants reiterate on numerous occasions that Congress has here impermissibly trenched upon the rights of state legislatures to make fiscal judgments. Congress, of course, did no such thing. It simply declared that henceforth a carefully delimited group of public employees should, like their private counterparts, receive a very modest minimum wage and, under certain circumstances, premium pay for overtime work. Depending upon whether the states chose to continue these activities at their present level, to reduce them, or to alter them in some other way, this might mean that a given state could find it necessary to appropriate more funds for these purposes. But the decisions as to whether taxes will be raised or whether these increased labor costs will be met in another fashion remains the prerogative of the states. As Judge Winter noted, similar arguments concerning the fiscal independence of the states were rejected by this Court in *Oklahoma* v. *Atkinson,* 313 U.S. 508, 534 and, indeed, in each of the many cases in which this Court upheld the applicability of Congressional regulations to the states there was the possibility of increased costs for the states involved. *Maryland* v. *Wirtz,* 269 F. Supp. 826, 846.

And so, stripped of their considerable rhetoric, Appellants' arguments rest on the proposition that they should not be required to eliminate what Congress has determined to be substandard working conditions. Federalism is a two way street. This legislation might never have been necessary had the vigorous exponents of states' rights in this litigation expounded as vigorously the correlative requirement of states' responsibilities. The grocer charges the attendant at a public hospital the same amount that he charges the attendant at a private hospital. The shoes that the janitor at a

public school buys for his children cost the same as the shoes purchased by his counterpart at a private school. Unhappily, the wages Congress has declared to be a minimum standard in these areas remain insufficient to raise a worker's family above the poverty level. But these employers oppose even that.

Congressman Collier relied, in sponsoring the coverage of school employees, on the fact that regular cafeteria employees were in some instances earning only 85 cents an hour. See p. 9, *supra*. Such facts speak far more eloquently than lengthy legal rhetoric about states rights. No amount of inapplicable, esoteric abstractions regarding state sovereignty can convert this case from anything but the familiar attempt of employers to resist the obligation to raise the wages of their employees to those modest minimums Congress has established. Congress had before it facts that cried out for relief and, fortunately, it has the constitutional authority to grant that relief.

CONCLUSION

For the reasons stated herein, the decision of the Court below should be affirmed.

Respectfully submitted,

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March 1968

SUPREME COURT OF THE UNITED STATES

No. 742.—October Term, 1967.

Maryland et al., Appellants, v. W. Willard Wirtz, Secretary of Labor, et al.	On Appeal From the United States District Court for the District of Maryland.

[June 10, 1968.]

Mr. Justice Harlan delivered the opinion of the Court.

As originally enacted,[1] the Fair Labor Standards Act required every employer to pay each of his employees "engaged in commerce or in the production of goods for commerce"[2] a certain minimum hourly wage, and to pay at a higher rate for work in excess of a certain maximum number of hours per week. The Act defined the term "employer" so as to exclude "the United States or any State or political subdivision of a State . . . ."[3] This case involves the constitutionality of two sets of amendments to the original enactment.

In 1961, Congress changed the basis of employee coverage: instead of extending protection to employees individually connected to interstate commerce, the Act now covers all employees of any "enterprise" engaged in commerce or production for commerce, provided the enterprise also falls within certain listed categories.[4] In 1966, Congress added to the list of categories the following:

"(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick,

[1] 52 Stat. 1060 (1938).

[2] §§ 6 (a), 7 (a), 52 Stat. 1062, 1063.

[3] § 3 (d), 52 Stat. 1060.

[4] The minimum wage requirement, 29 U. S. C. § 206, now reads as follows: "(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production

> the aged, the mentally ill or defective who reside on the premises of such institution, a school for the mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit)." [5]

At the same time, Congress modified the definition of "employer" so as to remove the exemption of the States and their political subdivisions with respect to employees of hospitals, institutions, and schools.[6]

The State of Maryland, since joined by 27 other States and one school district, brought this action against the Secretary of Labor to enjoin enforcement of the Act insofar as it now applies to schools and hospitals operated by the States or their subdivisions. The plaintiffs made four contentions. They argued that the expansion of coverage through the "enterprise concept" was beyond the power of Congress under the Commerce Clause. They contended that coverage of state-operated hospitals and schools was also beyond the commerce power. They asserted that the remedial provisions of the Act,[7] if

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of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates . . . ." The maximum hours requirement, 29 U. S. C. § 207, now contains a similar definition of covered employees. The term "enterprise engaged in commerce or in the production of goods for commerce" is defined by 29 U. S. C. § 203 (s) to mean "an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—[falls in any one of four listed categories] . . . ."

[5] 80 Stat. 832, 29 U. S. C. § 203 (s) (4).

[6] 80 Stat. 831, 29 U. S. C. § 203 (d).

[7] 29 U. S. C. §§ 216 (b), 216 (c), 217.

applied to the States, would conflict with the Eleventh Amendment. Finally, they urged that even if their constitutional arguments were rejected, the court should declare that schools and hospitals, as enterprises, do not have the statutorily required relationship to interstate commerce.

A three-judge district court, convened pursuant to 28 U. S. C. § 2282, declined to issue a declaratory judgment or an injunction.[8] Three opinions were written. Judges Winter and Thomsen, comprising the majority, concluded for different reasons that the adoption of the "enterprise concept" of coverage and the extension of coverage to state institutions could not be said, on the face of the Act, to exceed Congress' power under the Commerce Clause. Both declined to consider the Eleventh Amendment and statutory contentions. Judge Northrop dissented, concluding that the amendments exceeded the commerce power because they transgressed upon the sovereignty of the States.

We noted probable jurisdiction of the plaintiffs' appeal, 389 U. S. 1031. For reasons to follow, we affirm the judgment of the District Court.

I.

We turn first to the adoption in 1961 of the "enterprise concept." Whereas the Act originally extended to every employee "who is engaged in commerce or in the production of goods for commerce," it now protects every employee who "is employed in an enterprise engaged in commerce or in the production of goods for commerce."[9] Such an enterprise is defined as one which, along with other qualifications, "has employees engaged in commerce

[8] 269 F. Supp. 826.

[9] 29 U. S. C. §§ 206 (a), 207 (a).

or in the production of goods for commerce . . . ." [10] Thus the effect of the 1961 change was to extend protection to the fellow employees of any employee who would have been protected by the original Act, but not to enlarge the class of employers subject to the Act.

In *United States* v. *Darby*, 312 U. S. 100, this Court found the original Act a legitimate exercise of congressional power to regulate commerce among the States. Appellants accept the *Darby* decision, but contend that the extension of protection to fellow employees of those originally covered exceeds the commerce power. We conclude, to the contrary, that the constitutionality of the "'enterprise concept" is settled by the reasoning of *Darby* itself and is independently established by principles stated in other cases.

Darby involved employees who were engaged in producing goods for commerce. Their employer contended that since manufacturing is itself an intrastate activity, Congress had no power to regulate the wages and hours of manufacturing employees. The first step in the Court's answer was clear: "[Congress may] by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce." [11]

The next step was to discover whether such a "substantial effect" existed. Congress had found that substandard wages and excessive hours, when imposed on employees of a company shipping goods into other States, gave the exporting company an advantage over companies in the importing States. Having so found, Con-

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[10] 29 U. S. C. § 203 (s).

[11] 312 U. S., at 119. The Act prohibited both the interstate transportation of goods produced under substandard labor conditions, and the maintenance of such conditions themselves. The first prohibition, a restraint on commerce itself, was upheld against the contention that its real motive or purpose was to regulate manufacturing. The language quoted in the text answered a challenge to the second prohibition.

gress decided as a matter of policy that such an advantage in interstate competition was an "unfair" one, and one that had the additional undesirable effect of driving down labor conditions in the importing States.[12] This Court was of course concerned only with the finding of a substantial effect on interstate competition, and not with the consequent policy decisions. In accepting the congressional finding, the Court followed principles of judicial review only recently rearticulated in *Katzenbach* v. *McClung*, 379 U. S. 294, 303–304:

> "Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators . . . have a rational basis for finding a chosen scheme necessary to the protection of commerce, our investigation is at an end." [13]

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[12] Section 2 of the Act, 52 Stat. 1060, 29 U. S. C. § 202, reads in part as follows:

"The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce . . . ."

[13] In *Katzenbach* v. *McClung*, it appeared that Congress had undertaken extensive investigation of the commercial need for the statute there involved. A major contention of the appellants in the present case is that the legislative history of the amendments now before us lays no factual predicate for extensions of the original Act. To the extent that this is true, it is quite irrelevant. The original Act stated Congress' findings and purposes as of 1938. Subsequent extensions of coverage were presumably based on similar findings and purposes with respect to the areas newly covered. We are not concerned with the manner in which Congress reached its factual conclusions.

There was obviously a "rational basis" for the logical inference that the pay and hours of production employees affect a company's competitive position.

The logical inference does not stop with production employees. When a company does an interstate business, its competition with companies elsewhere is affected by all its significant labor costs, not merely by the wages and hours of those employees who have physical contact with the goods in question. Consequently, it is not surprising that this Court has already explicitly recognized that Congress' original choice to extend the Act only to certain employees of interstate enterprises was not constitutionally compelled; rather, Congress decided, at that time, "not to enter areas which it might have occupied [under the commerce power]." *Kirschbaum* v. *Walling*, 316 U. S. 517, 522.

The "enterprise concept" is also supported by a wholly different line of analysis. In the original Act, Congress stated its finding that substandard labor conditions tended to lead to labor disputes and strikes, and that when such strife disrupted businesses involved in interstate commerce, the flow of goods in commerce was itself affected.[14] Congress therefore chose to promote labor peace by regulation of subject matter, wages, and hours, out of which disputes frequently arise. This objective is particularly relevant where, as here,[15] the enterprises in question are significant importers of goods from other States.

Although the Court did not examine this second objective in *Darby*, other cases have found a "rational basis" for statutes regulating labor conditions in order to pro-

[14] Section 2, 29 U. S. C. § 202, declares in part that the existence of substandard labor conditions "leads to labor disputes burdening and obstructing commerce and the free flow of good in commerce."

[15] See *infra*, pp. 9–10

tect interstate commerce from labor strife. The National Labor Relations Act [16] had been passed because

> "[t]he denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining led to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . . ." [17]

In *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, this Court held that the NLRA was within the commerce power. The essence of the decision was contained in two propositions: "the stoppage of those [respondent's] operations by industrial strife would have a most serious effect upon interstate commerce"; *id.*, at 41, and "[e]xperience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace." *Id.*, at 42.

The Fair Labor Standards Act, including the present enterprise definition of coverage, may also be supported by two propositions. One is identical with the first proposition supporting the NLRA: strife disrupting an enterprise involved in commerce may disrupt commerce. The other is parallel to the second proposition supporting the NLRA: there is a basis in logic and experience for the conclusion that substandard labor conditions among any group of employees, whether or not they are personally engaged in commerce or production, may lead to strife disrupting an entire enterprise.

Whether the "enterprise concept" is defended on the "competition" theory or on the "labor dispute" theory,

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[16] 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.*

[17] § 1, 49 Stat. 449.

it is true that labor conditions in businesses having only a few employees engaged in commerce or production may not affect commerce very much or very often. Appellants therefore contend that defining covered enterprises in terms of their employees is sometimes to permit "the tail to wag the dog." However, while Congress has in some instances left to the courts or to administrative agencies the task of determining whether commerce is affected in a particular instance, *Darby* itself recognized the power of Congress instead to declare that an entire class of activities affects commerce.[18] The only question for the courts is then whether the class is "within the reach of the federal power."[19] The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest. *Wickard* v. *Filburn*, 317 U. S. 111, 127–128; *Polish Alliance* v. *Labor Board*, 322 U. S. 643, 648; *Katzenbach* v. *McClung, supra*, at 301. The class of employers subject to the Act was not enlarged by the addition of the enterprise concept. The definition of that class is as rational now as it was when *Darby* was decided.

II.

Appellants' second contention is that the commerce power does not afford a constitutional basis for extension of the Act to schools and hospitals operated by the States or their subdivisions. Since the argument is made in terms of interference with "sovereign state functions," it is important to note exactly what the Act does. Although it applies to "employees," the Act specifically exempts any "employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic

[18] 312 U. S., at 120–121.

[19] *Ibid.*

administrative personnel or teacher in elementary or secondary schools) . . . ." [20] We assume, as did the District Court,[21] that medical personnel are likewise excluded from coverage under the general language. The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which school and hospital duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform medical and educational functions is not factually accurate. Congress has "interfered with" these state functions only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals.[22]

It is clear that labor conditions in schools and hospitals can affect commerce. The facts stipulated in this case indicate that such institutions are major users of goods imported from other States. For example:

> "In the current fiscal year an estimated $38.3 billion will be spent by State and local public edu-

[20] 29 U. S. C. § 213 (1).

[21] See 269 F. Supp., at 832 (opinion of Judge Winter).

[22] In the court below, Judge Thomsen was troubled by the application of the overtime provisions to school and hospital personnel, who may have different arrangements for hours of work than employees of other enterprises. 269 F. Supp., at 851. Congress indicated its attention to this problem in 29 U. S. C. § 207, which provides special means of computing hospital overtime. That this provision may seem to some inadequate, and that no similar provision was made in the case of schools, are matters outside judicial cognizance. The Act's overtime provisions apply to a wide range of enterprises, with differing patterns of worktime; they were intended to change some of those patterns. It is not for the courts to decide that such changes as may be required are beneficial in the case of some industries and harmful in others.

> cational institutions in the United States. In the fiscal year 1965, these same authorities spent $3.9 billion operating public hospitals. . . .
>
> "For Maryland, which was stipulated to be typical of the plaintiff States, 87% of the $8 million spent for supplies and equipment by its public school system during the fiscal year represented direct interstate purchases. Over 55% of the $576,000 spent for drugs, x-ray supplies and hospital beds by the University of Maryland hospital and seven other State hospitals were out-of-state purchases.[23]

Similar figures were supplied for other States.[24] Strikes, and work stoppages involving employees of schools and hospitals, events which unfortunately are not infrequent,[25] obviously interrupt and burden this flow of goods across state lines. It is therefore clear that a "rational basis" exists for congressional action prescribing minimum labor standards for schools and hospitals, as for other importing enterprises.[26]

Indeed, appellants do not contend that labor conditions in all schools and hospitals are without the reach of the commerce power, but only that the Act may not be constitutionally applied to state-operated institutions because that power must yield to state sovereignty in the performance of governmental functions. This argument simply is not tenable. There is no

> "general doctrine implied in the Federal Constitution that the two governments, national and state,

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[23] 269 F. Supp., at 833 (opinion of Judge Winter).

[24] See *ibid.*

[25] See U. S. Department of Labor, Summary Release, Work Stoppages Involving Government Employees (1966).

[26] Both under the present Act and the National Labor Relations Act, numerous cases have held that the engagement of an enterprise in interstate commerce may consist of importation. *E. g., Wirtz* v. *Hardin & Co.*, 253 F. Supp. 579, aff'd, 359 F. 2d 792 (FLSA); *N. L. R. B.* v. *Baker Hotel*, 311 F. 2d 528 (NLRA).

> are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other." *Case* v. *Bowles*, 327 U. S. 92, 101.

In the first place, it is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as "governmental" or "proprietary" in character. As long ago as *Sanitary District* v. *United States*, 266 U. S. 405, the Court put to rest the contention that state concerns might constitutionally "outweigh" the importance of an otherwise valid federal statute regulating commerce. Congress had imposed statutory limits on the diversion of water from Lake Michigan. A unanimous Court, speaking through Mr. Justice Holmes, declared that the sanitary district's alleged need for more water than federal law allowed was "irrelevant" because federal power over commerce is "superior to that of the States to provide for the welfare or necessities of their inhabitants." *Id.*, at 426. See *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508.

There remains, of course, the question whether any particular statute is an "otherwise valid regulation of commerce." This Court has always recognized that the power to regulate commerce, though broad indeed, has limits. Mr. Chief Justice Marshall paused to recognize those limits in the course of the opinion that first staked out the vast expanse of federal authority over the economic life of the new Nation. *Gibbons* v. *Ogden*, 9 Wheat. 1, 194–195. Mr. Chief Justice Hughes, speaking only one Term after he delivered the opinion for the Court in *Jones & Laughlin*, *supra*, put the matter thus:

> "the subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of com-

merce, but the constitutional differentiation still obtains." *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, 466.

The Court has ample power to prevent what the appellants purport to fear, "the utter destruction of the State as a sovereign political entity." [27]

But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation. This was settled by the unanimous decision in *United States* v. *California*, 297 U. S. 175. The question was whether a railroad,

[27] The dissent suggests that by use of an "enterprise concept" such as that we have upheld here, Congress could under today's decision declare a whole State an "enterprise" affecting commerce and take over its budgeting activities. This reflects, we think, a misreading of the Act, of *Wickard* v. *Filburn*, *supra*, and of our decision. The Act's definition of "enterprise" reads in part as follows:

"'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose . . . but shall not include the related activities performed for such enterprise by an independent contractor . . . ." 29 U. S. C. § 203(r).

We uphold the enterprise concept on the explicit premise that an "enterprise" is a set of operations whose activities in commerce would all be expected to be affected by the wages and hours of any group of employees, which is what Congress obviously intended. So defined, the term is quite cognizant of limitations on the commerce power. Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.

operated by the State, and entirely within the State, as a nonprofit venture for the purpose of facilitating transportation at a port, was nevertheless subject, like other railroads, to the Safety Appliance Act. The Court first held that although the railroad operated only between points in California, it was within the reach of federal regulation of interstate rail transportation. 297 U. S., at 181–183. The Court then proceeded to consider the claim that the State "is not subject to the federal Safety Appliance Act," and reasoned as follows:

> "[W]e think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the Federal Government in the Constitution.
>
> . . . . .
>
> "[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual." 297 U. S., at 183–185 (citations omitted).

See also *Board of Trustees* v. *United States*, 289 U. S. 48, where the Court rejected a claim of "state sovereignty" and held that a state university that imported scientific apparatus from abroad could be made to pay import duties imposed pursuant to the power over foreign commerce.

The principle of *United States* v. *California* is controlling here. Appellants' argument that the statute involved there was somewhat more directly and obviously a regulation of "commerce," and that the state activity involved there was less central to state sovereignty, misses the mark. This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States. But it will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens.[28]

III.

Appellants raise two further issues, both of which the District Court found it inappropriate to explore fully in a declaratory judgment proceeding. We agree. In each case we conclude that no showing has been made that warrants declaratory or injunctive relief. In neither instance, however, do we mean to preclude future consideration on the facts of individual cases.

The first question is whether the Act violates the States' sovereign immunity from suit guaranteed by the Eleventh Amendment.[29] The Act provides as follows:

> "[a]ny employer who violates the provisions of section 206 [wages] or section 207 [hours] of this

[28] Nor is it relevant that Congress originally chose to exempt all state enterprises and later partially removed that exemption. Congress was as free to include state activities within the general regulation at a later date as it would have been to omit the exemption in the first place.

[29] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

> title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction . . . ." 29 U. S. C. § 216 (b).

The Act also provides for suits by the Secretary of Labor to recover unpaid minimum wages or overtime compensation, 29 U. S. C. § 216 (c) and for injunctive relief against violations, 29 U. S. C. § 217.

Percolating through each of these provisions for relief are interests of the United States and problems of immunity, agency, and consent to suit. Cf. *Parden v. Terminal R. Co.*, 377 U. S. 184. The constitutionality of applying the substantive requirements of the Act to the States is not, in our view, affected by the possibility that one or more of the remedies the Act provides might not be available when a State is the employer-defendant. Particularly in light of the Act's "separability" provision, 29 U. S. C. § 219, we see no reason to strike down otherwise valid portions of the Act simply because other portions might not be constitutional as applied to hypothetical future cases. At the same time, we decline to be drawn into an abstract discussion of the numerous complex issues that might arise in connection with the Act's various remedial provisions. They are almost impossible and most unnecessary to resolve in advance of particular facts, stated claims, and identified plaintiffs and defendants. Questions of state immunity are therefore reserved for appropriate future cases.

Appellants' remaining contention presents similar problems. In order to be covered by the Act, an employer hospital or school must in fact have

> "employees engaged in commerce or in the production of goods for commerce, including employees

handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person . . . ." 29 U. S. C. § 203 (s).

Appellants ask us to declare that hospitals and schools simply have no such employees. The word "goods" is elsewhere defined to exclude "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." 29 U. S. C. § 203 (i). Appellants contend that hospitals and schools are the ultimate consumers of the out-of-state products they buy, and hence none of their employees handles "goods" in the statutory sense.

We think the District Court was correct in declining to decide, in the abstract and in general, whether schools and hospitals have employees engaged in commerce or production. Such institutions, as a whole, obviously purchase a vast range of out-of-state commodities. These are put to a wide variety of uses, presumably ranging from physical incorporation of building materials into hospital and school structures, to over-the-counter sale for cash to patients, visitors, students, and teachers. Whether particular institutions have employees handling goods in commerce, cf. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, may be considered as occasion requires.

The judgment of the District Court is

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 742.—October Term, 1967.

Maryland et al., Appellants, v. W. Willard Wirtz, Secretary of Labor, et al.	On Appeal From the United States District Court for the District of Maryland.

[June 10, 1968.]

Mr. Justice Douglas, with whom Mr. Justice Stewart concurs, dissenting.

The Court's opinion skillfully brings employees of state-owned enterprises within the reach of the Commerce Clause; and as an exercise in semantics it is unexceptionable if congressional federalism is the standard. But what is done here is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism.

The case has some of the echoes of *New York* v. *United States*, 326 U. S. 572, where a divided Court held that the Federal Government could tax the sale of mineral waters owned and marketed by New York. My dissent was in essence that the decision made the States pay the Federal Government "for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution." 326 U. S., at 596.

The present federal law takes a much more serious bite. The 1966 amendments to the Fair Labor Standards Act require the States to pay school and hospital employees a minimum wage escalating to $1.60 per hour in 1971.[1] As a general rule, the amendments make the States pay their employees who work over 40 hours a week overtime compensation of 1½ times their regular

[1] 29 U. S. C. §§ 203 (d), 206 (b).

wage.[2] There are civil sanctions against the State and its political subdivisions,[3] and state officials may, apparently, be subjected to criminal penalties.[4] The impact is pervasive, striking at all levels of state government. As Judge Northrup said in his dissent below, 269 F. Supp. 826, 853–854:

> "By this Act Congress is forcing, under threat of civil liability and criminal penalties, the state legislature or the responsible political subdivision of the state
>
> "1. to increase taxes (an impossibility in some of the political subdivisions without a state constitutional amendment); or
>
> "2. to curtail the extent and calibre of services in the public hospitals and educational and related institutions of the state; or
>
> "3. to reduce indispensable services in other governmental activities to meet the budgets of those activities favored by the United States Congress; or
>
> "4. to refrain from entering new fields of governmental activity necessitated by changing social conditions.

There can be no doubt but that the 1966 amendments to the Fair Labor Standards Act disrupt the fiscal policy of the States and threaten their autonomy in the regulation of health and education. Yet, the Court considers it irrelevant that these federal regulations are to be enforced against sovereign States and limits its consideration to "whether there is a rational basis for regarding them as regulations of commerce among the States."

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[2] 29 U. S. C. § 207 (b). Special rules are applicable to hospitals under § 207 (j) based on an 80-hour, 14-day work period. No special rules apply to school employees. See discussion of the overtime pay provisions by Chief Judge Thomsen, 269 F. Supp., at 851–852.

[3] 29 U. S. C. §§ 203 (d), 216 (b).

[4] 29 U. S. C. §§ 203 (a), 215, 216 (a).

The States are not totally immune from federal regulation under the commerce power of Congress. *Parden* v. *Terminal R. Co.*, 377 U. S. 184, and *United States* v. *California*, 297 U. S. 175, subjected state-owned railroads to the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, and the Safety Appliance Act, 45 U. S. C. § 1 *et seq.*, *Board of Trustees* v. *United States*, 289 U. S. 48, required a state university to pay federal customs duties on educational equipment it imported. In *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, the Federal Government was permitted to condemn 100,000 acres of state land for a reservoir to control commerce-paralyzing floods. In *Sanitary District* v. *United States*, 266 U. S. 405, a State was prohibited from diverting water from the Great Lakes necessary to ensure navigability, a phase of commerce.

In none of these cases, however, did the federal regulation overwhelm state fiscal policy. It is one thing to force a State to purchase safety equipment for its railroad and another to force it either to spend several million more dollars on hospitals and schools or substantially reduce services in these areas. The commerce power cases the Court relies on are simply not apropos.

In the area of taxation, on the other hand, the Court has recognized that the constitutional scheme of federalism imposes limits on the power of the National Government to tax the States. *E. g.*, *New York* v. *United States*, 326 U. S. 572. The Court will not permit the Federal Government to utilize the taxing power to snuff out state sovereignty, *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, recognizing that the power to tax is the power to destroy. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 431. The exercise of the commerce power may also destroy state sovereignty. All activities affecting commerce, even in the minutest degree, *Wickard* v. *Filburn*, 317 U. S. 111, may be regulated and controlled by Con-

gress. Commercial activity of every stripe may in some way "interfere with the [inter-state] flow of merchandise" or interstate travel. *Katzenbach* v. *McClung*, 379 U. S. 294, 299–300. The immense scope of this constitutional power is demonstrated by the Court's approval in this case of regulation on the basis of the "enterprise concept"—which is entirely proper when the regulated "businesses" are not essential functions being carried on by the States.

Yet state government itself is an "enterprise" with a very substantial effect on interstate commerce, for the States spend billions of dollars each year on programs that purchase goods from interstate commerce, hire employees whose labor strife could disrupt interstate commerce, and act on such commerce in countless subtle ways. If constitutional principles of federalism raise no limits to the commerce power where regulation of state activities are concerned, could Congress compel the States to build super highways cross-crossing their territory in order to accommodate interstate vehicles, to provide inns and eating places for interstate travelers, to quadruple their police forces in order to prevent commerce-crippling riots, etc.? Could the Congress virtually draw up each State's budget to avoid "disruptive effect[s] on . . . commercial intercourse."? *Atlanta Motel* v. *United States*, 379 U. S. 241, 257.

If all this can be done, then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment. The principles which should guide us in this case are set forth in the several opinions in *New York* v. *United States*, *supra*. As Mr. Chief Justice Stone said there, the National Government may not "interfere unduly with the State's performance of its sovereign functions of government." 326 U. S., at 587. It may not "impair the State's functions of government," *id.*, at 594 (dis-

senting opinion of MR. JUSTICE DOUGLAS, joined by MR. JUSTICE BLACK). As Mr. Justice Frankfurter observed, "there are, of course, state activities . . . that partake of uniqueness from the point of view of intergovernmental relations." *Id.*, at 582.

Whether, in a given case, a particular commerce power regulation by Congress of state activity is permissible depends on the facts. The Court must draw the "constitutional line between the State as government and the State as trader . . . ." *New York* v. *United States*, *supra*, at 579 (opinion of Mr. Justice Frankfurter). In this case the State as a sovereign power is being seriously tampered with, potentially crippled.

I would reverse the judgment below.